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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 113.

SAMUEL CASTNER, JR., AND HENRY B. CURRAN, TRADING UNDER THE FIRM NAME AND STYLE OF CASTNER & CURRAN, PETITIONERS,

vs.

W. H. COFFMAN, DOING BUSINESS UNDER THE NAME AND STYLE OF POCAHONTAS COKE AND COAL COMPANY AND W. H. COFFMAN COKE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED AUGUST 16, 1902.
CERTIORARI AND RETURN FILED NOVEMBER 22, 1902.

(16,955.)

(16,955.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 370.

SAMUEL CASTNER, JR., AND HENRY B. CURRAN, TRADING UNDER THE FIRM NAME AND STYLE OF CASTNER & CURRAN, PETITIONERS,

vs.

W. H. COFFMAN, DOING BUSINESS UNDER THE NAME AND STYLE OF POCAHONTAS COKE AND COAL COMPANY AND W. H. COFFMAN COKE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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1 *Transcript of Record.*

Be it remembered that heretofore. to wit:

In the circuit court of the United States for the district of West Virginia, at chambers, on the 31st day of March, A. D. 1897, an order was made and entered of record; which order is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

On reading the bill of complaint, filed in the above-entitled cause on the 12th day of March, 1897, and on reading and filing the affidavits of Samuel Castner, Jr., Henry B. Curran, David H. Matson, George A. Shirey, Albert S. Hurst, Thomas L. Wilcox, L. D. Calfee, Nicholas A. Sayers, F. E. Dille, John M. Stockman, Charles E. Wales, Fred. W. Barney, Horace N. Claxton, George E. Atkins, Henry R. Mather and Arthur V. Briesen, and the exhibits accompanying said affidavits,

Now, on motion of Henry E. Everding, solicitor and of counsel for the complainants, and due consideration had, it is—

Ordered that the defendant, W. H. Coffman, show cause before me, at Charleston, West Virginia, on the 4th day of May, 1897, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an injunction should not issue against the said defendant as prayed for in said bill of complaint; and it is further—

2 Ordered that the said defendant, W. H. Coffman, be restrained from the date of service of this order until the further order of this court from selling, advertising or offering for sale any coal as "Pocahantas" coal, or from continuing the acts complained of in and by said bill of complaint; and it is further—

Ordered that a copy of this decree be served upon the defendant personally on or before the 10 day of April, 1897.

It is further ordered that before the restraining order above set forth shall be operative the complainants shall file with the clerk of this court a bond in the penal sum of one thousand dollars ($1,000.00), which bond is to be approved by the clerk.

(Signed) JACKSON, *Judge.*

March 31, '97.

The bill referred to in the foregoing order was duly filed in the office of the clerk of said court, at Charleston, on the 12th day of March, 1897, and is in the words and figures following, to wit:

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United States Circuit Court, District of West Virginia.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,
vs.
W. H. COFFMAN, Doing Business under the Name and Style of the Pocahontas Coal and Coke Company and W. H. Coffman Coke Company, Defendant. } In Equity.

To the honorable the judges of the circuit court of the United States in and for the district of West Virginia, sitting in equity:

Samuel Castner, Jr., and Henry B. Curran, both of the city of Philadelphia, in the State of Pennsylvania, and citizens of said State and of the United States, and trading at said Philadelphia and elsewhere, as copartners under the name and style of Castner & Curran, bring this their bill of complaint against W. H. Coffman, a resident and inhabitant of Bluefield, in the State of West Virginia, and a citizen of said State of West Virginia, and doing business in said State under the name and style of the Pocahontas Coke & Coal Company and under the name and style of the W. H. Coffman Coke Company.

And thereupon your orators complain and say:

3 I. That heretofore and about the year 1882, in the State of Virginia and county of Tazewell, in said State, a tract or field of smokeless bituminous or semi-bituminous coal was opened and mined.

II. That during said year 1882, the first mine in said region or field was opened and operated in Tazewell county, Virginia, by the Southwest Virginia Improvement Company, a corporation duly organized and transacting business under the laws of the State of Virginia, a copy of the charter of said corporation being hereto annexed and marked Exhibit "A." That shortly thereafter, but still in the year 1882, the said corporation, the Southwest Virginia Improvement Company, named their mine Pocahontas, and began selling the coal therefrom as "Pocahontas" coal, having adopted the trade-mark "Pocahontas" as designating its said output.

III. That thereafter and prior to the first day of January in the year 1884, Castner & Co., Limited, a partnership association formed under the laws of the State of Pennsylvania, and of which your orator, Samuel Castner, Jr., was chairman or president, and your orator, Henry B. Curran, was treasurer, and of which both of your orators were sole managers, did purchase from the said corporation, the Southwest Virginia Improvement Company, the coal so mined, and did ship and sell said coal principally at tidewater points under the name of "Pocahontas" coal.

IV. That thenceforth the said Castner & Co., Limited, dealt in, inspected, shipped and sold coal from the said region or field aforesaid as "Pocahontas" coal in large quantities, and under the license of the said corporation, the Southwest Virginia Improvement Com-

pany, advertised, shipped and billed the said coal as "Pocahontas" coal, and with each quantity of coal shipped or billed, or sought to be sold, a letter, note or bill was sent to the purchaser, or prospective purchaser, whereon the said coal was uniformly designated as "Pocahontas."

V. That thereafter, about the year 1889, your orators, Samuel Castner, Jr., and Henry B. Curran, became the successors and assigns of the said Castner & Co., Limited, and thereupon your orators as copartners continued the aforesaid business of said Castner & Co., Limited, under the firm name and style of Castner & Curran, and dealt in and sold large quantities of said coal under the aforesaid trade-mark designation of "Pocahontas," and shipped or billed and advertised for sale said coal as "Pocahontas" coal and "Pocahontas" Flat Top coal, and with each quantity shipped, billed or advertised for sale, a letter, note or bill was sent to the purchaser, or prospective purchaser, whereon said coal was uniformly designated as "Pocahontas," and that your orators, by reason of the careful inspection and purification of their coal increased largely from year to year the sale of the said coal.

4

VI. And your orators further show unto your honors that your orators and their predecessor, Castner & Co., Limited, from the year 1883, until the present time, have, during the first twelve years, with the license and permission of the said corporation, the Southwest Virginia Improvement Company, and thereafter as owners of the said trade name, or mark, continuously carried on the coal business aforesaid, and have inspected, selected, shipped, offered for sale, and have sold large quantities of coal under the said trade name or mark, "Pocahontas."

VII. That on or about the 1st day of April, 1895, by an assignment in writing, duly executed by the said corporation, the Southwest Virginia Improvement Company, a copy whereof is hereto annexed and marked Exhibit "B," your orators, Castner & Curran, became the owners of the entire right, title, interest and good will in and to the trade name or mark, "Pocahontas" aforesaid, together with the exclusive right to use said trade name or mark as a designation for all coal thereafter sold by the said Castner & Curran, and became vested also with the exclusive right to sue and recover for all gains, profits, advantages or damages arising out of past, present and future infringements of the said trade name or mark, "Pocahontas."

VIII. And your orators further show unto your honors that they have devoted much time and expended large sums of money in inspecting, selecting, grading, and otherwise maintaining the superior quality and purity of the said coal, whereby the same has acquired and now possesses a great reputation in the markets of the world under the name "Pocahontas" coal or "Pocahontas" Flat Top coal, and has been and is much sought after under the name or trade-mark "Pocahontas," by dealers and by the public, and your orators aver that, by reason of the premises, the sole and exclusive right to the use of the word symbol "Pocahontas," as a trade-mark for coal, is now vested in your orators, and is of great value to them in their said business.

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IX. And your orators aver that the public and dealers gen-
5 erally have acquiesced in your orators' exclusive rights in the premises, and that your orators have not knowingly acquiesced in any violation of their said rights by permitting the unlawful use of said trade-mark, but, on the contrary, have repeatedly warned the trade and public, by advertisements and otherwise, to respect your orators' rights, which warnings have uniformly, up to the present time, been sufficient to deter others from unlawfully invading your orators' rights under the said trade-mark for coal.

X. And your orators further aver that prior to November 1st, 1896, they controlled the output of the various coll-eries in what is now known as the "Great Flat Top coal region," including the colliery of the "Indian Ridge Coal & Coke Company" of West Virginia; that they sold so much of this output as came up to the grade of the "Pocahontas" coal in respect to quality, purity and size as "Pocahontas" coal, but that the output of the aforesaid Indian Ridge colliery was impure, and required special care and attention, and yielded but a small proportion of the "Pocahontas" coal marketed by your orators.

XI. And your orators further show unto your honors that the defendant, W. H. Coffman, is a factor or agent engaged in the sale of coal and coke at Bluefield, West Virginia, and elsewhere, and amongst other things he sells and advertises for sale are bituminous and semi-bituminous coals from the Indian Ridge colliery, situated in West Virginia, which coals are inferior in quality and purity to the coal of your orators, said coal of the defendant not being of the standard established by your orators, but being greatly inferior thereto in respect to quality, purity, and also in respect to size.

XII. Yet your orators aver and charge that the said defendant, well knowing the premises, and intending and contriving to deceive dealers in coal and the public, and to cause purchasers of coal sold by the said defendant to believe that the same was sold by your orators, or is of the quality of that sold by your orators, has at Bluefield, West Virginia, in the district of West Virginia, and elsewhere, unlawfully offered for sale and sold a very inferior and a very impure coal under the name and designation of "Pocahontas," and has and is accompanying the offer, as well as delivery of said inferior and impure coal, with letters, notes and bills, whereon the word symbol "Pocahontas," is prominently displayed, and in which the words "Pocahontas" coal, or "Pocahontas" Flat Top coal, or sundry abbreviations thereof, appear in a most conspicuous man-
ner, and that purchasers, or would-be purchasers, of his
6 inferior and impure coal, are liable to be, and will be, deceived by the representations of the said defendant into purchasing the coal of defendant as your orators' superior and specially selected coal, and your orators aver and charge it to be a fact that purchasers have heretofore been so deceived, and that the reputation of your orators' "Pocahontas" coal has thereby been tainted, and that the defendant intends to and will continue the aforesaid unlawful acts, unless prevented by this honorable court; and that in this unlawful business the said defendant and his confederates

are and have been engaged since about the month of November, 1896.

XIII. And your orators further aver and charge it to be a fact, that for the purpose of deceiving the public and unlawfully invading the rights of your orators, the said defendant, W. H. Coffman, and his confederates, who are conspiring with him to that end, are trading under the name and style of the Pocahontas Coke and Coal Company, ostensibly a corporation of West Virginia, in reality not incorporated under the laws of the said West Virginia or any other State, being simply a name or title assumed by the said defendant for the purpose of selling his coal as "Pocahontas" coal or as your orators' coal and of thereby deceiving the public; and your orators further aver, on information and belief, that the said Coffman is a person wholly irresponsible and incapable of responding to any damages which might be assessed against him by reason of his said unlawful acts and doings.

XIV. And your orators further show unto your honors, that they have given due notice to said defendant of their said rights and have requested him to cease his violation of said rights, but that such notice has been wholly disregarded by the said defendant.

XV. And your orators further aver that they have suffered and are suffering great damage, injury and loss in their business by reason of the unlawful acts of the said defendant hereinbefore complained of, and that such damage is largely in excess of the sum of ten thousand dollars, but how much in excess your orators are not now able to state, and that said damage, injury and loss have arisen not only from the loss of sales, but also from the loss of reputation by reason of said infringement by the said defendant of your orators' trade-mark, whereby the reputation of your orators' aforesaid coal has been injured with the public, and your orators believe that if the said defendant continues and persists in his aforesaid

7 unlawful acts in the premises, great and irreparable damage, confusion and injury will be occasioned thereby unto your orators and to the public.

To the end, therefore, that the said defendant may, if he can, show why your orators should not have the relief hereby prayed, and may, according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer, make to the several matters and things hereinbefore stated and charged, as if more particularly interrogated respecting the same, but an answer under oath is hereby expressly waived.

And that the said defendant may be decreed to account for and pay over unto your orators all gains, profits and advantages which he, the said defendant, has realized from the sale of coal shipped, billed or otherwise advertised, in any manner as "Pocahontas" coal, or as "Pocahontas" Flat Top coal, and the damages thereby suffered by your orators, and it be referred to a master to take and state an account of such profits, gains, advantages and damages and report the same to this honorable court.

And your orators further pray that the said defendant, W. H. Coffman, in his own name and in the name of the Pocahontas Coke

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and Coal Company, and in the name of the W. H. Coffman Coke Company, and his, its or their servants, attorneys, associates, confederates, agents and workmen, and each and every of them may be perpetually restrained by a writ, or writs, of injunction issuing out of and under the seal of this honorable court from selling, or causing to be sold, shipping or billing, or causing to be shipped and billed, or the offering for sale or advertising for sale, or in any manner disposing of any coal designated as "Pocahontas," "Pocahontas" Flat Top, or any abbreviations of Pocahontas, and from in any manner imitating or simulating said trade-mark, "Pocahontas," of your orators, or of using the name "Pocahontas" in any manner whatsoever in connection with the coal business, and that a provisional injunction to the same effect be issued, pending this suit.

And that your orators may have such other and further relief as the nature of the case may require and to your honors may seem meet, including the costs of this suit.

May it please your honors to grant unto your orators not only the writs of injunction conformable to the prayer of this bill, but also a writ, or writs, of *subpœna ad respondendum* issuing out of and under the seal of this honorable court directed to the said W. H. Coffman, commanding him to appear and make answer to
8 this bill of complaint and to perform and abide by such decree herein as to your honors shall seem meet.

And your orators will ever pray, &c.

SAMUEL CASTNER, JR.
HENRY B. CURRAN.

ARTHUR V. BRIESEN,
HENRY E. EVERDING,
J. WALTER DOUGLASS,
Solicitors and of Counsel for Complainants.

STATE OF PENNSYLVANIA, }
City and County of Philadelphia, } ss:

Samuel Castner, Jr., and Henry B. Curran, the above-named complainants, being separately and severally duly sworn according to law, depose and say, and each for himself deposes and says: that they, and each of them, have read the foregoing bill of complaint by them subscribed, and know the contents thereof; that the allegations of the said bill are true to the best of their respective knowledge, except as to matters therein set forth on information and belief, and as to all such matters they do each verily believe it to be true; and, further, they do each depose and say that the entire right, title, interest or good will in the said trade-mark "Pocahontas," by written assignment, is duly vested in them at the date hereof.

SAMUEL CASTNER, JR.
HENRY B. CURRAN.

Sworn to and subscribed before me, this 10th day of March, A. D. 1897.

J. WALTER DOUGLASS,
[NOTARIAL SEAL.] *Notary Public.*

Exhibit "A," referred to in the foregoing bill, is in the words and figures following, to wit:

EXHIBIT "A."

Charter of the Southwest Virginia Improvement Company.

An act to incorporate the Southwest Virginia Improvement Company.

Approved March 9th, 1880.

Chapter 247, Acts of Assembly 1879–'80, page 241.

Corporators.

9 Be it enacted by the General Assembly of Virginia, That J. E. Askridge, James L. Radford, George W. Palmer, John F. Slaughter, Daniel P. Graham, Richard Wood, John Graham, Jr., and G. C. Wharton, or such of them as may accept the provisions of this act, their associates and successors be and they are hereby incorporated and made a body politic and corporate under the name and style of the Southwest Virginia Improvement Company.

Corpor'e name.

Common seal, &c.

2. The said company may, by or under its corporate title, make and use a corporate seal, which it may alter or renew at its pleasure, and may sue and be sued, plead and be impleaded, contract and be contracted with, and make by-laws, rules and regulations consistent with existing laws of the State for the government of all under its authority, the management of its estates and properties, and the due and orderly conduct of its affairs.

Capital stock.

3. The capital stock of said company shall not be less than three hundred thousand dollars, and may be increased to any amount not exceeding ten million dollars, by issue and sale of shares thereof, not less than ten dollars each, from time to time, under such regulations as the board of directors of said company, shall from time to time prescribe; and the directors may receive real or personal property in payment for subscriptions to the capital stock at such valuation as may be agreed upon between the directors and the subscriber.

How subscriptions paid.

Power to purchase hold, &c., mortgage, &c., real and personal estate.

4. The said company shall have power and may purchase, hold, grant, mortgage or otherwise dispose of real and personal estate in this State or elsewhere; and the said company shall have power and may lay out said lands, or any part thereof, into parcels or lots of convenient size,

Lay out lands.

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with intervening roads, lanes, streets and alleys, and develop, work, improve, cultivate, sell, grant, mortgage, or otherwise dispose of in such manner and upon such terms as the said company may think proper; and may contract for, construct, operate and maintain works of public or private improvement; provided, however, that nothing in this section shall be construed as exempting the said company from the provisions of chapter sixty-one of the code of eighteen hundred and seventy-three, if they shall engage in constructing or operating any work of internal improvement in this State; nor shall the said section be construed so as to authorize the said company to construct any railroad or turnpike without a special act for that purpose.

Operate works of internal improvement.

Proviso.

Power to loan money on mortgage, discount notes, &c.

5. The said company shall have power and may loan money on mortgage or deed of trust conveying real or personal estate, or on other securities and for such periods as the said company may think proper; may discount any bill of exchange, foreign or domestic promissory note, or other negotiable paper, and the interest may be received in advance.

May receive money on deposits.

6. The said company may receive money to keep for its depositors, either with or without interest payable thereon, and may buy or sell bullion, buy, sell, draw and negotiate bills of exchange.

Power to manufacture, purchase, &c., goods, wares, &c., build pipe lines, warehouses, &c.

7. The said company shall have power and may manufacture, purchase, sell, ship and deal in goods, wares and merchandise, and may contract for, build and maintain pipe lines, warehouses and elevators, and may store goods, wares and merchandise, and grant certificates therefor, in such form and under such rules and regulations as the said company may from time to time by by-law prescribe, and to transport goods, wares and merchandise, either by land or water, and may make, grant and issue fire, marine and other protective policies of insurance, and may do and perform all things necessary to carry the provisions of this act into effect; provided, that if said company shall avail themselves of the power granted above as regards policies of insurance, they shall be considered to be a foreign insurance company and subject to the general rules relating to foreign insurance companies.

To transport goods, &c.

Proviso.

Drafts, &c., binding on Co. and transferable and negotiable.

8. All drafts, orders, checks or other paper of the said company signed by the president and countersigned by the cashier, promising or di-

recting the payment of any money, or the delivery of any securities or other thing, shall be binding on said company, and any draft, order, check or other paper issued and signed and countersigned as aforesaid, shall be transferable and negotiable, if payable to order, by endorsement, and if payable to bearer, by delivery.

First board of directors.

9. The persons first named in this act shall constitute the first board of directors of the said company, and shall continue in office until the first meeting of the stockholders thereof. At such first meeting, and at every annual meeting, so many directors shall be elected as may be prescribed by the by-laws and regulations of said company, who may be removed by the stockholders in general meeting; but, unless so removed, shall continue in office until their successors shall be elected and qualified.

Directors, how elected.

How removed.

Tenure of office.

Who may be directors.

President.

10. The board of directors shall be stockholders of said company. They shall appoint one of their number president, and may fill any vacancy that may occur in said board, unless by removal, in which case the same shall be filled by the stockholders in general meeting. The board shall appoint, to hold during its pleasure, the subordinate officers and agents of the said company, prescribe their compensations, and take from them such bonds with such security as they may deem fit.

Subordinate officers.

Offices.

Proviso.

11. The board of directors may establish offices and agencies at such places as they may deem proper, but the principal office of the company shall be located at some point within the limits of the State of Virginia.

Place of annual meetings.

12. The annual meeting of the stockholders of the said company shall be held at New River Depot, in Pulaski county, Virginia, on the first Wednesday of August of each year, or on such other day as the stockholders may, by resolution adopted in any annual meeting, to take effect at the next annual meeting, prescribe. A general meeting of the stockholders of said company may be held at any time, as provided for by the eighth section of chapter fifty-seven of the Code of Virginia, edition of eighteen hundred and seventy-three.

General meetings.

Certificate of stock.

13. The said company shall issue certificates of stock in said company to the original subscribers thereof in shares of not less than ten dollars each, signed by the president and countersigned by the secretary of said company. The said cer-

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How transferable.

tificates shall only be transferred by endorsement thereon, made by the original subscriber therefor, his personal representative or transferee, and when so transferred, shall pass to the transferee thereof the number of shares of the capital stock of the said company represented by the said certificates, with all dividends thereafter declared thereon; and the said certificates, when so transferred as aforesaid, may be returned to the said company and cancelled, and new certificates of stock shall be issued in lieu thereof to the person entitled thereto for a like number of shares.

When cancelled and new certificates to be issued.

Liability of stockholders.

14. No stockholder in said company shall ever be held liable or made responsible for its debts and liabilities in a larger or further sum than the amount of any unpaid balance due to the said company for stock subscribed for by said stockholder.

Liability to taxation.

15. Whenever this corporation shall exercise any of the privileges conferred by this act, it shall be liable to the same taxes as may be imposed by law upon other like corporations or persons exercising like privileges.

Proviso.

12 16. Provided, that all the real estate acquired shall be disposed of in thirty years.

Charter subject to general laws.

17. The charter heretofore granted is hereby declared to be subject to the provisions of the general law in regard to chartered companies and incorporations, as expressed in the Code of Virginia, edition of eighteen hundred and seventy-three, chapters fifty-six, fifty-seven, fifty-eight, fifty-nine and sixty-one.

Commencem't.

18. This act shall be in force from its passage,

Right to modify reserved.

but the General Assembly of the State of Virginia reserves to itself the right to modify, alter or repeal this act at any time hereafter.

Exhibit "B," referred to in the foregoing bill, is in the words and figures following, to wit:

EXHIBIT "B."

Whereas the Southwest Virginia Improvement Company, a corporation duly organized and existing under an act of the legislature, or assembly, of Virginia, approved March 9th, 1880, chapter 247, Acts of Assembly, 1879–1880, page 241, and having its principal place of business at Pocahontas, in the county of Tazewell, and State of Virginia, did adopt on or about the first day of July, 1882, as a trade name or mark the word symbol "Pocahontas" for coal mined in a region or field opened up and operated in Tazewell county, Virginia, in the year 1882, by the said corporation, the

Southwest Virginia Improvement Company, and which trade name or mark it continued to use thereafter in its coal-mining operations in said region or field from the date aforesaid, as the trade name or mark for all coal mined and sold by it up to the present time.

And whereas, the said corporation, the Southwest Virginia Improvement Company, has, under a certain agreement dated March 26th, 1895, appointed as its general factor, or agent, the firm of Castner & Curran, consisting of Samuel Castner, Jr., and Henry B. Curran, both of Philadelphia, Pennsylvania, and trading thereat under the firm name and style of Castner & Curran.

And whereas the said Castner & Curran have acquired, as general agents, the entire control and output of coal mined by the said corporation, the Southwest Virginia Improvement Company, and
wh h coal has become known under the trade name or
13 mark "Pocahontas," by adoption and continuous use thereof,
by the said corporation, the Southwest Virginia Improvement Company, as aforesaid, and are desirous of securing also the exclusive right, title, interest and good will in and to said trade name or mark "Pocahontas" for all coal to be hereafter sold by the said Castner & Curran.

Now, therefore, to all whom it may concern: Be it known that for and in consideration of the sum of five ($5.00) dollars by the said Samuel Castner, Jr., and Henry B. Curran, trading as aforesaid as Castner & Curran, unto the said corporation, the Southwest Virginia Improvement Company, in hand paid, the receipt whereof is hereby acknowledged, the said corporation, the Southwest Virginia Improvement Company has sold, assigned, transferred and set over and by these presents does sell, transfer and set over unto the said Samuel Castner, Jr., and Henry B. Curran, trading as aforesaid as Castner & Curran, all and whatsoever right, title, interest and good will the said corporation, the Southwest Virginia Improvement Company has, or ever had, in and to by adoption and use of the word symbol "Pocahontas" as a trade name or mark for coal; the same to be held and enjoyed absolutely by the said Samuel Castner, Jr., and Henry B. Curran, trading as aforesaid, as Castner & Curran, forever, for their own use or advantage and behoof, and for the use or advantage and behoof of their successors, legal representatives or assigns as fully and entirely to all intents and purposes at common law or otherwise, as the said corporation, the Southwest Virginia Improvement Company could or might, or would have held the good will, right, title and interest in the said trade name or mark "Pocahontas," hereby conveyed absolutely unto the said Samuel Castner, Jr., and Henry B. Curran, trading as aforesaid as Castner & Curran, had this assignment and sale of the said good will and entire right, title and interest in and to the said trade name or mark "Pocahontas" for coal, not been made.

And the said corporation, the Southwest Virginia Improvement Company hereby further assigns, transfers and sets over all its rights which have accrued, or may hereafter accrue, to any and all gains, profits, advantages or damages of whatsoever character, whether for

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past, present or future infringements of the said trade, name or mark, together with the right to institute suits for the recovery of said gains, profits, advantages or damages arising out of such infringements, and to retain the same for the personal use and benefit of the said Castner & Curran.

In witness whereof, the said corporation, the Southwest
14 Virginia Improvement Company, has caused these presents to be signed by its president, and its corporate seal to be affixed under the due attestation of its secretary, this 1st day of April, A. D. 1895.

SOUTHWEST VIRGINIA IMP'T CO.,
[SEAL.] By LOGAN M. BULLITT, *President.*

Attest: CHAS. S. THORNE, *Secretary.*

(Endorsed:) United States circuit court, district of West Virginia. In equity. Castner *et al.*, complainants, *vs.* Coffman *et al.*, defendant-. Bill of complaint. Arthur V. Briesen, Henry E. Everding, J. Walter Douglass, solicitors and of counsel for complainants. Circuit court U. S., dist. W. Va. Filed in open court this 12 day of March, 1897. L. B. Dellicker, clerk.

The affidavits referred to in the order of March 31, above set forth, are as follows, and were all filed on the said 31st March as hereinafter shown.

The affidavit of Samuel Castner, Jr., referred to in said order is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

STATE OF PENNSYLVANIA, } *ss:*
City and County of Philadelphia, }

15 SAMUEL CASTNER, JR., being duly sworn according to law, deposes and says, that in the year 1883 and prior thereto, he was the chairman of Castner & Co., Limited, a partnership association formed under the laws of the State of Pennsylvania, and having its principal office at Philadelphia, in said State; that the said partnership association during the year 1883 shipped and acted as factors or agents for the sale of coal of a bituminous or semi-bituminous nature, mined by the Southwest Virginia Improvement Company at its mine in Tazewell county, at a place founded and afterwards named by said company "Pocahontas;" that during the year 1882, the said Southwest Virginia Improvement Com-

pany began to sell its coal under the purely fanciful and arbitrary name of Pocahontas, and called its mine the Pocahontas mine, and founded a town, which it also called "Pocahontas," which town was afterwards incorporated by a special act of the legislature of Virginia on January 31st, 1884; that prior to January, 1884, the firm of Castner & Co., Limited, had received coal from the said Southwest Virginia Improvement Company, which was sold and shipped to said Castner & Co., Limited, as "Pocahontas" coal, or "Pocahontas Flat Top" coal, and the firm of Castner & Co., Limited, as agents for said Southwest Virginia Improvement Company thereafter, but, prior to January, 1884, sold said coal at tidewater points as "Pocahontas" and "Pocahontas Flat Top" coal; that in the year 1884, the said firm of Castner & Co., Limited, entered into certain agreements with the Southwest Virginia Improvement Company, the Flat Top Coal Company and the Norfolk and Western Railroad Company whereby the said firm of Castner & Co., Limited, became the tidewater agents for the sale of all coal then mined in what became known as the Great Flat Top coal region, as more fully appears by the copies of said agreements, hereto annexed, and marked "Exhibit Contract A" and "Exhibit Contract B;" that the firm of Castner & Co., Limited, continued under said agreements, and supplemental agreements, to act as tidewater agents for the sale of all coal mined in the said region or field, and continued to sell said coal uniformly as "Pocahontas" coal, by virtue of the license and permission of the said Southwest Virginia Improvement Company, until the formal transfer in the year 1889, of all its property to its successors and assigns, Castner & Curran, a firm or copartnership formed by this deponent and Henry B. Curran, the complainants in the present action, for the purpose of continuing the business of said Castner & Co., Limited, as tidewater agents for the sale of "Pocahontas" coal; that on or about the 26th day of March,
16 1895, the firm of Castner & Curran became general agents for the sale of all coal mined in the said "Great Flat Top" coal region, and mined by various collieries in Virginia and West Virginia, to which State the mining operations in said "Great Flat Top" coal region had been extended; that by an assignment duly executed and bearing date the 1st of April, 1895, the firm of Castner & Curran were duly vested by the said Southwest Virginia Improvement Company with the entire right, title and interest in and to the aforesaid trade-mark "Pocahontas," as appears by the copy of the assignment attached to the bill of complaint in the present suit; that from the year 1883 up to the present time, the said Castner & Co., Limited, and the copartnership of Castner & Curran, have continuously acted as factors and agents for the sale of the coal aforesaid from the "Great Flat Top" coal-field, under the distinctive title of "Pocahontas," or "Pocahontas Flat Top" coal, and have expended large sums of money in the inspection and selection of said coal, in the maintenance of the superior quality of said coal and in the advertising and offering for sale of the said coal as "Pocahontas" and "Pocahontas Flat Top" coal; that so great has become the reputation of the coal selected and sold by Castner & Co., Limited, and

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Castner & Curran that the coal of late years has become known simply as Pocahontas coal, to the exclusion and disuse of the former name of Great Flat Top and Flat Top coal, as appears from the copies of the contracts of March 26th, 1895, hereto annexed and marked Exhibit Contract "D" and Exhibit Contract "E," and from the map of the coal region aforesaid, also annexed hereto and marked Exhibit "G;" that the public and dealers in coal uniformly acquiesced in the right of the said Castner & Co., Limited, and its successor, the said firm of Castner & Curran, to the use of said trade-mark; that through inadvertence and ignorance of the existence of said trade-mark some dealers have heretofore sought to market their coal as "Pocahontas," but upon notification of the rights of the said Castner & Curran, and their predecessor, Castner & Co., Limited, these dealers have uniformly immediately ceased infringing on the said trade-mark; that lately this deponent began to receive from the customers and agents of Castner & Curran and from others advices to the effect that "Pocahontas" coal was being offered for sale at a reduced price, thereby lessening the sales of said agents; that immediately this deponent investigated the matter and found that one W. H. Coffman, of Bluefield, West Virginia, was advertising, shipping, billing and delivering coal mined in West Virginia
17 at the Indian Ridge mine in an extension of the said Great Flat Top coal-field, and inferior in quality to that dealt in by the said firm of Castner & Curran, which coal is designated and sold by the said W. H. Coffman as coal from the "Pocahontas" Flat Top district, a district which, in fact, does not and never did exist; that the said Coffman has created in the minds of the public, dealers and consumers of "Pocahontas" coal the false impression or idea that the said Coffman has the right to sell, and in fact is selling, "Pocahontas" coal, and by simulations, as well as by adroitly worded false advertisements, the said Coffman has sought to fortify his position of alleged right to market fuel under the name of "Pocahontas" coal, and thereby to deceive the innocent public; that to further the sale of such coal, the said Coffman is transacting business under the name and style of the Pocahontas Coke and Coal Company, at said Bluefield, West Virginia, which, though ostensibly a corporation, has no legal existence as such, but is a myth, assumed by the said Coffman in the furtherance of his unlawful acts; that the said Coffman, to the best of this deponent's belief, is a person financially unable to respond to any damages which might be assessed against him arising out of his unlawful acts and doings, as aforesaid; that this deponent has also received from many of the customers of his said firm of Castner & Curran postal cards and advertising matter received by said customers and soliciting orders for Pocahontas Flat Top District coal, and issued by the aforesaid W. H. Coffman Coke Company and the Pocahontas Coke and Coal Company, and having on their back in large type the words "Pocahontas Coke and Coal Company," and the words "smokeless coal" and "Pocahontas smokeless coal;" that said customers have inquired of this deponent's said firm of Castner & Curran, how it was that "Pocahontas" coal could be obtained from the said Coffman

and his assumed companies; that two of said postal cards are annexed to this affidavit and made part hereof, being marked Exhibits "I" and "II;" that this deponent immediately on November 6th, 1896, notified the aforesaid Coffman in writing of the exclusive rights of the said firm of Castner & Curran to the trade-mark or the word symbol "Pocahontas," and received in reply a letter to the effect that the word "Pocahontas" was a geographical name and as such was not registrable or segregable as a trade-mark, as appears by said letter of November 12th, 1896, hereto annexed and marked Exhibit "J;" that upon the letter-heads issued to the trade and public by the said Coffman appear the words
18 "Pocahontas Flat Top coal" and also the words "Pocahontas Coke and Coal Company;" that the said letter-head is hereto annexed and made part of this affidavit, and marked Exhibit "K;" that there is no city, town or mining village in West Virginia by the name of Pocahontas, and the coal mined for and sold by the said Coffman does not come from the town of Pocahontas, in Virginia, but from a mine in the county of Mercer, West Virginia, known as the Indian Ridge mine or colliery; that prior to the 1st day of November, 1896, this deponent's said firm of Castner & Curran controlled the output of the said Indian Ridge mine, and sold the same, after a most rigid inspection, as "Pocahontas" coal; that from its location and geological situation, the said Indian Ridge mine produces a coal containing many impurities, which must be eliminated before the same approaches the standard of excellence of the Pocahontas coal sold by this deponent's said firm of Castner & Curran, and of the standard found at the mine of the Southwest Virginia Improvement Company, in Tazewell county, Virginia; that deponent is informed and believes that since the 1st of November, 1896, and under the control of the said Coffman, the coal mined and shipped from the said Indian Ridge mine has deteriorated greatly from the standard of Pocahontas coal, and that many impurities are shipped by said Coffman with said coal, which impurities, when the coal was controlled by the said Castner & Curran, had to be removed prior to the acceptance and sale by the said Castner & Curran of the said coal; that the sales of coal of this deponent's said firm of Castner & Curran under the trade-mark "Pocahontas" amount, annually, to nearly three million (3,000,000) tons; that this deponent is informed and believes that the said Coffman is financially irresponsible, and that the acts of the said Coffman, unless at once restrained, will work serious and irreparable injury to the business and reputation of the said firm of Castner & Curran, which business and reputation have only been built up and maintained by an enormous outlay of money in the advertising and marketing of the said "Pocahontas" coal under the said trade-mark; that the acts of the said Coffman and his confederates in different parts of this country have and are now working great injury and damage to the business of this deponent's said firm of Castner & Curran, and moreover, as appears from the affidavit of Charles E. Wales, duly verified on the 15th day of March, A. D. 1897, and the affidavit of Fred. W. Barney, duly verified on the 16th day of March,

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A. D. 1897, the unlawful acts and doings of the said Coff-
19 man and his agents in this matter, have caused others throughout the United States to advertise and offer coal for sale, and to sell such coal as and under the said word symbol "Pocahontas" and by simulations and imitations as to advertising methods and literature of this deponent's said firm, have led the public into buying an inferior grade of coal in the belief that it was and is getting genuine or *bona fide* "Pocahontas" coal, and through such deception upon the public this deponent's said firm business has suffered and is now being seriously injured and the public itself is being defrauded.

SAMUEL CASTNER, JR.

Sworn to and subscribed before me, this 18th day of March, A. D. 1897.

J. WALTER DOUGLAS,
[SEAL.] *Notary Public.*

"Exhibit Contract A," referred to in the foregoing affidavit, is in the words and figures following, to wit:

EXHIBIT "A."

Coal Producers' Contract.

Memorandum of agreement, entered into this 29th day of December, A. D. one thousand eight hundred and eighty-four (1884), by and between the Norfolk and Western Railroad Company, designated herein as the railroad company, the Southwest Virginia Improvement Company, the Flat Top Coal Company, and its present lessees, namely, John Cooper and Company, the Caswell Creek Coal and Coke Company, William Booth and Company and such other coal operators in the Great Flat Top Coal region as may, subsequent to the date hereof, become parties hereto, their and each of their successors, executors, administrators and assigns, designated herein as the producers.

Whereas, the producers are respectively and separately, by themselves and their lessees, engaged in the mining of coal in the Great Flat Top coal region, and it is to their interest that the output of coal should be increased, its market, both local and tidewater, be developed to its fullest extent, its handling and sale be made uniform and economical, and its price to the public be neither uncertain nor excessive.

And whereas, the railroad company desires to secure the
20 transportation of the entire coal output of said producers, and to enlarge and develop the mining operations of the region, and to promote the prosperity of the industries along its line, by insuring regular supplies of fuel at fair and stable prices.

Now, therefore, it is agreed as follows:

First. The railroad company shall appoint a person, firm or company who shall act for the producers as their general coal agent in

the sale of line-trade coal, and in the allotment, shipment and supervision of sales of tidewater coal, and in consideration of the engagements made herein by the producers, the railroad company guarantees and makes itself responsible for prompt and full settlements by such general coal agent as herein provided.

Second. The producers shall consign their entire product of coal intended for rail transportation other than that used for coke, to the general coal agent, and the general coal agent shall accept the same and pay for line-trade coal freshly mined and delivered in cars of the railroad company, at the respective tipples, the following prices per ton for the run-of-mine coal:

(*a*.) Coal sold to connecting railroads and other than the Norfolk and Western railroad, and to blast furnaces, rolling mills and the Roanoke machine works, eighty-five (85) cents.

(*b*.) Coal sold at competitive points, or points upon the lines of connecting railroads, one dollar ($1.00).

(*c*.) Coal sold at strictly local points upon the lines of the Norfolk and Western and Shenandoah Valley railroads, one dollar and fifteen cents ($1.15).

In selling the coal described in (*a*), (*b*) and (*c*), the general coal agent shall add to the said prices ten (10) cents per ton in full of all expenses and commission.

By line-trade coal is meant all coal shipped to and sold at points other than those specified in section 5 of article third of this agreement.

By ton, as used in this agreement, is meant twenty-two hundred and forty (2,240) pounds.

Third. And whereas a considerable portion of the producers' output will naturally seek a market at tidewater, at Norfolk, or at the Lambert's Point piers, and it is to the interest of both the producers and the railroad company, that shipments to and sales at tidewater should be uniform, and should not interfere with the supply of line-trade coal.

Now, therefore, it is further agreed as follows:

1. The president of the railroad company shall appoint
21 a mutually acceptable person, firm, or company, to act as general tidewater coal agent for the sale of said coal at tidewater, at Norfolk, or at its Lambert's Point piers, for account of and as agent for the producers.

2. If such general tidewater coal agent shall at any time fail to make his payments as herein provided, or otherwise violate the provisions of this agreement, he shall, upon application of the producers or any of them, be removed by the president of the railroad company, and another mutually acceptable person, firm, or company be appointed in his stead.

3. Such general tidewater coal agent shall agree not to sell or deal in bituminous or semi-bituminous coal other than that transported by and over the line of the railroad company.

4. Such general tidewater coal agent shall agree to accept a commission of fifteen (15) cents per ton on all sales made by him under this agreement, in full for any and all compensation due

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him, and in consideration thereof will guarantee all sales made, will pay all marine insurance on coal to be delivered by vessel, and generally assume all the commercial risks in connection with such sales.

5. The business under this agreement to be assigned to the general tidewater coal agent is the disposition and sale of coal transported on the line of the railroad company, embraced as follows:

(*a.*) Coal for delivery over the piers at Norfolk, or Lambert's point.

(*b.*) Coal for delivery to foreign or coastwise steamships, steam or tug boats.

(*c.*) Coal for delivery by steam or sail vessel, and destined to American or coastwise ports, to ports in the gulf of Mexico, the West Indies, South America, or other delivery beyond the Virginia capes.

(*d.*) Coal for local delivery at Norfolk, Portsmouth, Gosport navy yard, or immediate vicinity.

6. The aggregate proceeds derived from the sale of coal under this agreement by the general tidewater coal agent shall be paid by said agent as provided below, after making the following deductions, viz.:

(*a.*) The commission allowed on sales to the general tidewater coal agent.

(*b.*) The cost of lighterage when coal is lightered, and such customary expense as may be authorized or approved by the general coal agent.

(*c.*) The charge for dumpage or loading on vessels not exceeding ten (10) cents per ton.

22 (*d.*) The vessel rate, or charter rate, when coal is sold for delivery by vessel.

(*e.*) The customary streetage on coal delivered in Norfolk, not exceeding one dollar ($1.00) per car.

The residue shall be paid as follows:

(*a.*) The railroad company shall receive a sum equal to seventy (70) per cent. for transportation, and shall not hold the producers liable therefor.

(*b.*) The producers shall receive thirty (30) per cent.

It is provided, however, and specially agreed, that the producers shall receive and be paid a monthly average of not less than seventy-five (75) cents, nor more than one dollar ($1.00) per ton out of the proceeds above mentioned.

7. The operations of the general tidewater coal agent under this agreement shall be subject to the exclusive control, supervision, and direction of the general coal agent, as to the amounts and times of shipments of coal to such general tidewater coal agent, the distribution of coal between the line and tidewater trades, the conduct of the business in the sale of coal, the matter of accounts, the prices at which coal may be sold at tidewater, whether to sell or not, and generally all the details connected therewith.

8. All moneys due by the general tidewater coal agent to the producers shall be received from the said agent and paid to the

procers by the general coal agent on the fifteenth day of each month. The settlements shall include the entire shipments of coal from the mines to the general tidewater coal agent during the preceding month, and for such coal as shall not have been sold and delivered during the month by said general tidewater coal agent, settlement shall be made at the minimum rate of seventy five (75) cents per ton, and upon the next monthly settlement day the said agent shall account for and pay over all further moneys, if any, found due after sale and delivery of such coal.

9. The producers, severally and individually, each for himself, accept the services of the general tidewater coal agent to be appointed as aforementioned, as their agent, respectively, the railroad company and the general coal agent being d to be, in no way held to any responsibility or liability to the producers, or either of them, for any payments, transaction, engagements, or acts of the said general tidewater coal agent, acting under this agreement.

23 Fourth. The parties hereto agree that during the existence of this contract they will make no sale of coal lands or mining rights or leases for coal operations, except upon the expressed condition that the purchaser, lessee or sublessee, shall become a party to this agreement.

Fifth. It is understood and agreed that coal deliverable by the Southwest Virginia Improvement Company to the Norfolk and Western Railroad Company under contract, dated the twenty-fifth day of March, A. D. 1882, is excepted from the operation of this contract. Such coal shall be delivered to and paid for through the general coal agent, but such deliveries and sales shall not enter into the calculation of the average price as provided in this agreement, nor shall any commission be collected upon the same.

Sixth. In case of a demand for lump coal in line or tidewater trade, preference always being given to the demand from local non-competitive points, it is agreed that the producer furnishing the same shall receive the excess price realized therefor, provided no sale shall be made at a difference of less than fifteen (15) cents per ton without the consent of the producer.

Seventh. If any claim shall be made by a purchaser of the coal on the ground of inferiority in quality, and such claim be allowed by the board of arbitration, the amount so allowed shall be deducted from any amount found due or that may become due such producer.

Eighth. When coal cannot be sold, the general coal agent shall notify the producers, who shall each suspend their respective shipments of coal in proportion to the amount of coal shipped by them, respectively, under the operation of this agreement during the last full working month; coal converted into coke by any of the producers, and also that shipped by the Southwest Virginia Improvement Company to the Norfolk and Western railroad under its existing contract of March 25th, 1882, shall not be considered as part of the output in arriving at this proportion. The producers, or any of them, may stop operations on account of strikes or accidents without the consent of the general coal agent, but notice thereof shall be promptly given to the general coal agent.

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Ninth. The general coal agent shall pay the producers not later than the fifteenth day of each month for all coal delivered by each producer in cars of the railroad company at their respective mines, for their account during the preceding month, such settle-
24 ment to be made with each operator at the average price realized upon the total sales of coal, both line trade and tidewater, shipped during the month by all the producers under this agreement; it being understood, however, that the general coal agent shall be responsible to the producers, as to tidewater coal, only for moneys actually received by him from the general tidewater coal agent, and that the producers will look respectively to the said general coal agent or the guarantee of the railroad company, and not to each other for any payment due and unpaid by the general coal agent to them. The general coal agent shall keep account books, and the producers shall at all times have access thereto, and all moneys received by the general coal agent shall be deposited in bank in a separate account kept for the purpose of depositing those funds.

Tenth.. If the general coal agent fails to make settlement for line-trade coal and for moneys received by him from the general tidewater coal agent as hereinbefore provided, any producer may notify the railroad company of such failure, and in case the amount due by said general coal agent be undisputed, and the railroad company shall not settle the same within ten days after such notification, then this agreement shall, at the option of a majority in number of the producers, be terminated, or in case the amount due by said general coal agent shall be in dispute, the question shall be submitted to the board of arbitration hereinafter provided for, and determined by them. And if the general coal agent or the railroad company shall not make full settlement in accordance with such determination within ten days after notification by said board of arbitration, then, also, at the option of a majority of the producers, this contract shall be terminated.

Eleventh. The general coal agent shall, during the existence of this contract, recognize and assume the two contracts for the delivery of coal heretofore entered into by the Southwest Virginia Improvement Company with the Seaboard and Roanoke Railroad Company, and the Virginia Steamboat Company.

Twelfth. The railroad company, under the direction of the general coal agent, shall, to the extent of its capacity, furnish the producers with coal cars with all feasible regularity, and in proportion to the shipment of each respective producer during the last preceding full working month.

Thirteenth. It is mutually agreed between the parties hereto,
25 that if any difference shall arise between them in relation to any question, matter, cause, or thing thereunder, the same shall be referred to a board of arbitration, composed of the presidents of the Norfolk and Western Railroad Company, the Southwest Virginia Improvement Company, and the Flat Top Coal Company, or other authorized representative of either, the decision of a majority of which board shall be accepted as final and conclusive

in the premises. They shall meet at such times and places as may be mutually agreed upon, and they shall also meet within ten days on written notice from any of the parties hereto.

Fourteenth. This agreement shall take effect on the first day of January, A. D. 1885, and shall remain in force until the thirty-first day of December, A. D. 1886, and shall continue thereafter until either party hereto shall give written notice to the other parties of a desire to amend or terminate the same, when, if not amended and continued by mutual agreement before, it shall, as to the line trade or as to the tidewater trade, absolutely terminate at the end of the third calendar month after date of said notice; provided, however, that all parties shall be bound hereby to fulfil all contracts and sales existing on the thirty-first day of December, A. D. 1886, or at date of notice as above, and provided that neither the general coal agent nor the general tidewater coal agent shall make contracts for sale and delivery of coal to extend beyond ninety days from the limits of this agreement, except with the consent of the producer.

In witness whereof, the parties hereto have, respectively, executed these presents, in quadruplicate, the day and year first above written.

NOTE.—The words "and continued" interlined in 10th line of last page before execution.—A. J. H.

NORFOLK AND WESTERN RAILROAD COMPANY,
By F. J. KIMBALL, *President.*

Attest:
[SEAL.] A. J. HEMPHILL, *Secretary.*

26 SOUTHWEST VIRGINIA IMPROVEMENT COMPANY,
By H. WICKHAM, *President.*

Attest:
[SEAL.] EDWARD J. COLLINS, *Secretary.*

FLAT TOP COAL COMPANY,
By C. H. DUHRING, *President.*

Attest:
[SEAL.] J. M. COLTON, *Secretary.*

JOHN COOPER AND CO.

Witness:
J. H. BRAMWELL.

CASWELL CREEK COAL & COKE CO.
JOHN FREEMAN, *Supt.*

Witness:
J. H. BRAMWELL.

WM. BOOTH & CO.
JOSEPH TAYLOR, *Supt.*

Witness:
G. W. BELCHER.

Sample Bill and Statement.

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Office of the general coal agent.

ROANOKE, VA., *February 15th*, 1885.

To John Cooper & Co., Dr.

For 6,000 tons of coal, at 90 cents per ton $5,400 00

This amount being settlement in full for coal produced during the month of January, 1885, in accordance with contract of December —, 1884, as per statement attached.

Office of the general coal agent.

ROANOKE, VA., *February 15th*, 1885.

Statement for January, 1885:

Coal productions from the Great Flat Top coal-fields. Consignments as follows:

27	Local points.....	15,000	tons at	$1.15.....	$17,250 00
	Competitive points,	10,000	" "	1.00.....	10,000 00
Connecting railroads, &c..		5,000	" "	.85.....	4,250 00
Tidewater		30,000	" "	.75.....	22,500 00
Total shipments.....		60,000	"	realizing.....	$54,000 00

Average price per ton for the month of January, 90 cents.

Production as follows:

By Southwest Virginia Improvement Co..	46,000	tons at	.90.....	$41,400 00
" John Cooper & Co....	6,000	" "	"	5,400 00
" Freeman & Co.....	4,000	" "	"	3,600 00
" Taylor & Co.....	4,000	" "	"	3,600 00
	60,000	"		$54,000 00

"Exhibit Contract B," referred to in the foregoing affidavit of Castner, is in the words and figures following, to wit:

"EXHIBIT B."

Tidewater Coal Contract.

Memorandum of agreement entered into this twenty-ninth day of December, A. D. one thousand eight hundred and eighty-four (1884), by and between the Norfolk and Western Railroad Company, designated herein as the railroad company, and Castner and Company, Limited, of Philadelphia.

Whereas, the railroad company has entered into a certain agreement under date of the 29th day of December, A. D. 1884, with the Southwest Virginia Improvement Company and others, an original of which is attached hereto, and forms part hereof, and is designated herein as the coal producers' contract;

And whereas, the railroad company in said coal producers' contract agreed to appoint a mutually acceptable person, firm, or company to act as general tidewater coal agent for the sale of coal from the Great Flat Top coal region, at tidewater, at Norfolk, or at its Lambert's Point piers for account of and as agent for the producers;

And whereas, Castner and Company, Limited, aver that they desire to receive the said appointment of general tidewater coal agent, further averring that there exists no reasons, financial or otherwise, why they should not accept such appointment and act under the same.

28 Now, therefore, it is agreed as follows:

First. The railroad company, in pursuance of such averment, hereby appoints Castner and Company, Limited, to the office of general tidewater coal agent, with all the obligations pertaining thereto, and as specified in the coal producers' contract.

Second. Castner and Company, Limited, averring that they are without commercial entanglements which would complicate their relations as such general tidewater coal agent, and have a sufficient moneyed capital to carry on such business successfully, hereby accept such appointment, assuming all the obligations and liabilities pertaining thereto, agreeing to diligently and faithfully attend to the duties thereof in such manner, and with such attention and care, as shall give the best pecuniary results to the signatory parties to the coal producers' contract

Third. Castner and Company, Limited, in all acts and relations, as general tidewater coal agent, will observe and be governed by the requirements and stipulations laid down in the coal producers' contract, and hereby accept the said contract as completely as though they had been a party thereto, and for this purpose will consider it a part of this agreement.

Fourth. Castner and Company, Limited, will not sell or deal in bituminous or semi-bituminous coal other than which shall be transported by and over the line of the railroad company.

Fifth. Castner and Company, Limited, will settle promptly for all coal sold under this agreement, as follows:

They shall pay the railroad company each week, on a day to be mutually agreed upon by the parties hereto, the amount due said railroad company upon coal sold and delivered by them during the preceding week, and when the stock on hand at tidewater, and in transit to them from the mines, shall exceed three thousand (3,000) tons, they will, on the excess, advance to the railroad company on account of freight charges one dollar and twenty-five cents ($1.25) per ton; and shall pay the producers, through the general coal agent, not later than the twelfth (12th) day of each month, for coal consigned to them during the preceding month.

Sixth. Castner and Company, Limited, will accept a commission of fifteen (15) cents per ton as sole compensation and in full
29 thereof, on sales made by them under this agreement, and in consideration of such commission will guarantee the validity and safety of all sales made by them, will insure and pay for all marine insurance on coal to be delivered by vessels, or assume the

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marine risk on coal sold for such deliveries, and generally assume all and every commercial risk in connection with such sales of coal.

Seventh. Castner & Company, Limited, do hereby release the railroad company and the general coal agent from any and all liability on account of any acts of omission or commission of the producers or either of them in connection with any sale or contract for the delivery of coal.

It is understood, however, that the railroad company, so far as it legally may, will use all proper and legitimate means to cause the producers to observe all the obligations and stipulations laid down in the said coal producers' contract.

Eighth. As the coal from the Great Flat Top coal region has proved to be of superior quality and suitable for steam purposes, and especially for the use of ocean steamships, as well as for sale in the West Indian and South American markets, Castner and Company, Limited, will use all proper means to supply such ocean steamships and such West Indian and South American markets by the establishment of proper and suitable agents to represent them in Europe, the West Indies, South America, &c., and will exercise diligent effort to sell all the coal which may be allot-ed to them by the general coal agent, and be transported to tidewater by the railroad company, and will obtain for such coal the highest market prices, having due regard to its high grade and commercial excellence as compared with other coal with which it may be brought into competition.

Ninth. Castner and Company, Limited, will provide and establish at their expense suitable facilities in the harbor of New York for the coaling of ocean steamships, and use proper means to secure contracts with the owners of such steamships, to supply said steamships with coal in the harbor of New York, and to accomplish this purpose will send a suitable person or representative to Europe to seek such contracts.

Tenth. The railroad company and the general coal agent shall at all times have free access to the books of Castner and Company, Limited.

30 Eleventh. Coal consigned to Castner and Company, Limited, shall be at the risk of the Norfolk and Western Railroad Company while standing on the tracks of the railroad company pending discharge, but shall be at the risk of Castner and Company, Limited, after having been unloaded into and while stored in coal pockets at Lambert's point after having been discharged from cars to lighters, to vessels or unloaded upon either pier for their account. In the case of coal for local delivery, the liability of the Norfolk and Western Railroad Company shall cease when cars have been placed in position to be unloaded on orders of Castner and Company Limited.

Twelfth. As the coal producers' contract referred to herein for the business contemplated hereunder covers the period from first day of January, A. D. 1885, until December 31st, 1886, this agreement shall take effect and terminate simultaneously with that contract, provided, however, that should Castner and Company, Limited, at any time fail to make their payments as herein provided, or otherwise

violate the provisions of this or of the producers' coal contract, the railroad company may immediately terminate this contract on notice in writing of its desire so to do, or should they fail in energy or ability in extending and pushing the sale of the coal herein referred to, or become financially involved to an extent which, in the opinion of the railroad company, would prove injurious to the other parties in interest, or impair their usefulness as such general tidewater coal agent, the railroad company may terminate this contract on notice in writing of its desire so to do, whereupon it shall cease and determine, and their appointment as general tidewater coal agent shall lapse at the end of the third calendar month after date of such notice, provided, however, that the parties hereto shall be bound by this agreement to the fulfillment of all and every contract for the sale and delivery of coal, made in pursuance of this and of the coal producers' contract and existing at the date of the notice above mentioned.

In witness whereof, the parties hereto have respectively executed these presents in duplicate the day and year first above written.

NORFOLK AND WESTERN
RAILROAD COMPANY,
[SEAL.] By F. J. KIMBALL, *President.*

Attest: A. J. HEMPHILL, *Secretary.*

31 CASTNER & CO., LIMITED,
By SAM'L CASTNER, JR., *Chairman, and*
By HENRY B. CURRAN, *Treas.*

Witnesses present:
JNO. G. McKORAHER.
W. C. BULLITT.

SAMUEL CASTNER, JR.,
HENRY B. CURRAM,
Managers.

"Exhibit Contract D" referred to in the foregoing affidavit of Castner is in the words and figures following, to wit:

EXHIBIT CONTRACT "D."

Memorandum of agreement made this 26th day of March, A. D. 1895, by and between Pulaski Iron Co, a corporation of the State of West Virginia, of the first part, and Samuel Castner, Jr., and Henry B. Curran, both of the city of Philadelphia, in the State of Pennsylvania, and doing business under the firm name of Castner & Curran, parties of the second part,

Witnesseth, that the parties hereto, each in consideration of the agreement of the other herein expressed, and of other good and valuable considerations, the receipt whereof is hereby acknowledged, have, respectively, agreed as follows, to wit:

1. The party of the first part agrees to constitute and appoint, and does hereby constitute and appoint, the parties of the second

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part its sole agents during each and every year of the life of this agreement, and any renewal or renewals thereof, to sell coal for the party of the first part. The prices and terms or sale shall be determined, from time to time, by the party of the first part. The party of the first part agrees to furnish all the coal, not exceeding 18,000 tons per month, which may be sold by its said agents at said prices and terms.

2. The party of the first part agrees to pay to the parties of the second part, and the parties of the second part agree to accept as their commissions on sales of coal made by them as such agents the following amounts, to wit: On sales of tidewater coal, five per cent. of the net selling price f. o. b. Norfolk; on all other
32 sales, fifteen cents per ton, except that no commission shall be paid on sales to the Norfolk & Western R. R. Co.; but the parties of the second part agree to accept said commissions upon the condition that they shall be employed as the sole and exclusive sales agents of the party of the first part; and it is agreed that if the party of the first part shall in any calendar year sell any coal through any other agents, the parties of the second part shall be entitled to collect, and the party of the first part shall pay to the parties of the second part a commission of twenty cents per ton upon all coal sold by the party of the first part during such calendar year. It is understood that a ton consists of 2,240 pounds.

3. The parties of the second part agree to act as agents of the party of the first part upon the terms and conditions in this agreement expressed, and further agree that they will not buy or sell any bituminous coal other than that of the party of the first part, either as agents or otherwise, except as herein provided. It is agreed by the parties hereto that the parties of the second part may act as selling agents for other producers of Pocahontas coal, provided they shall become and continue to be the exclusive agents of such producers, and provided further that the aggregate amount of coal sold during any year for the party of the first part shall not be less than 2.615 per cent. of the total amount of Pocahontas coal sold by the parties of the second part during that year.

4. The parties of the second part hereby guarantee payment for all coal sold by them as such agents, and agree to take charge of the inspection, shipment and delivery of said coal and the collection of bills therefor; to pay the cost of such inspection, and all freights, tolls and other charges in connection with such shipment and delivery, and to pay the party of the first part, on the fourteenth day of each and every month during the continuance of this agreement, the proceeds of all coal delivered for its account during the next preceding calendar month, less such cost of inspection, freights, tolls and other charges. It is agreed that all expenses connected with the selling of said coal shall be borne by the parties of the second part.

5. The parties of the second part agree to advance to the party of the first part, on the fourteenth day of each month and every month during the continuance of this agreement, on all coal of the party of the first part weighed but undelivered during the next

preceding calendar month, the same amount per ton paid by them for coal delivered during any such month.

33 6. The parties of the second part agree to keep complete and accurate books of account and proper vouchers of all transactions as such agents, which books and vouchers and all other papers relating to such transactions shall, at all reasonable times, be open to the inspection of the party of the first part, through its officers, agents or attorneys duly appointed.

7. It is mutually agreed by the parties hereto that any losses incurred by reason of the absence from any contract of sale of the usual strike clause shall be borne equally by the parties hereto, provided such contracts shall have been authorized by the party of the first part, and provided further that the liability of the party of the first part for such losses shall not exceed the sum of $735.37 in any one year.

8. This agreement shall continue from year to year until notice is given by either party prior to January 1st of any year, and this agreement shall cease on the first of March following such notice.

In witness whereof the Pulaski Iron Co. has caused this agreement to be duly executed by its proper officers, thereunto duly authorized by resolution of its board of directors, and the parties of the second part have hereunto set their several hands and seals the day and year first above written.

(Signed) PULASKI IRON CO.,
By A. J. DULL, *Pres't.*

Attest:
[SEAL.] AB'M S. PATTERSON, *Sec'y.*

Witness:
JOHN G. McKORAHER.

SAM'L CASTNER, JR., [SEAL.]
HENRY B. CURRAN, [SEAL.]
Trading as Castner & Curran.

Witness:
GEO. B. HAWKES.

"Exhibit Contract E," referred to in the foregoing affidavit of Castner, is in the words and figures following, to wit:

34 EXHIBIT CONTRACT "E."

Whereas an agreement in writing was entered into between the undersigned, dated the 26th day of March, 1895, whereby the parties of the second part in said agreement were constituted the sole agents for the sale of the coal of the party of the first part:

Now, therefore, in consideration of the sum of one dollar, in hand paid to each of the parties hereto by the other, the receipt of which is hereby acknowledged, and of the mutual promises herein contained, it is hereby further promised and agreed:

That, until the expiration of the said contract of 26th March, 1895, according to the terms thereof, the party of the first part will sell or

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dispose of no Pocahontas coal whatever save through the agency of the parties of the second part, and that in the event of the breach of this stipulation by the party of the first part, it will, and hereby does, waive all interest or right to its proportion of contracts or sales theretofore made by the parties of the second part, and said parties of the second part shall be forthwith entitled to terminate said contract of 26th March, 1895. This paragraph shall, however, not be so construed as to relieve the party of the first part from furnishing its due proportion of coal to enable the parties of the second part to fill all unexpired contracts, if required to do so by said parties of the second part, notwithstanding notice of termination of agency may have been given by them to the party of the first part.

The parties of the second part hereby promise and agree that in the event of the sale or disposition of any Pocahontas coal by any producer for whom they may at any time be acting as sales agent, except through the agency of the said parties of the second part, that they will at once, on receipt of written notice of the particulars of such sale or disposition from the party of the first part, and upon its written request, forthwith terminate its agency for such producer, whereupon it shall be the right and duty of the party of the first part to furnish 2.615 per cent. of that share of coal needed to fill outstanding contracts, which would otherwise have been furnished by said producer.

This agreement is to be annexed to and construed with said contract of 26th March, 1895, which is hereby ratified and confirmed.

In witness whereof, Pulaski Iron Co. has caused this agreement to be duly executed by its proper officers thereunto duly au-
35 thorized by resolution of its board of directors, and the parties of the second part have hereunto set their several hands and seals this 28th day of December, 1895.

(Signed) PULASKI IRON CO.,
By A. J. DULL, *Pres't.*

Attest:
[SEAL.] AB'M S. PATTERSON, *Sec'y.*

SAM'L CASTNER, JR. [SEAL.]
H. B. CURRAN. [SEAL.]
Trading as Castner & Curran.

Witnesses to both signatures:
JOS. D. BANETT.
GEORGE B. HAWKES.

Exhibit "G," referred to in the foregoing affidavit of Castner, is in the words and figures following, to wit:

(Here follows map marked p. 36.)

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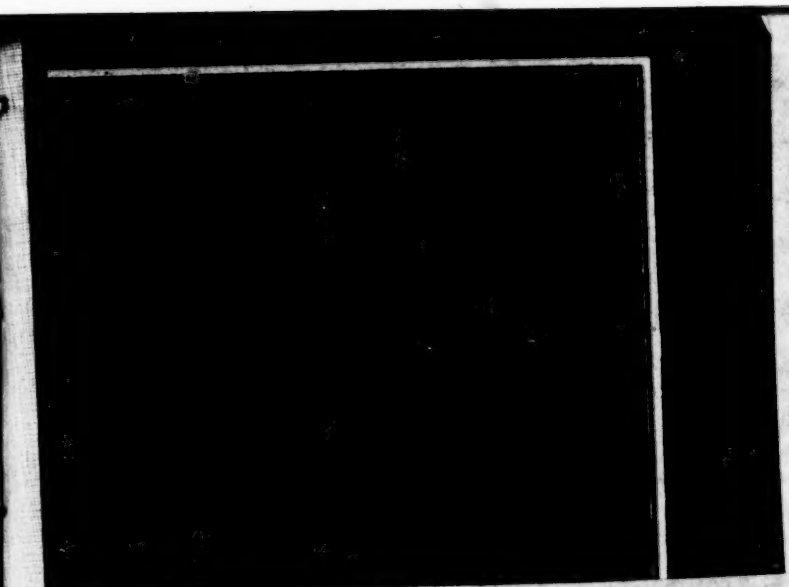

ing Pocahontas coal from us. We would advise you if this

FOLDOUTS TOO LARGE TO
BE FILMED

37 & 38 Exhibit "J," referred to in the foregoing affidavit of Castner, is in the words and figures following, to wit:

EXHIBIT "J."

Office of the W. H. Coffman Coke Company.

Average analysis of coke.	
Moisture	00.196
Fixed carbon	93.625
Volatile matter	00.494
Sulphur	00.677
Ash	05.004

(Picture.)

Our foundry & furnace coke was awarded the 1st premium at the World's fair in 1893.

R. R. weights at billing stations to govern all settlements. Contracts contingent upon matters beyond our control.

General factors and shippers of Pocahontas Flat Top coke; so low in ash that it requires no fluxing for foundry purposes.

BLUEFIELD, W. VA., *Nov.* 12, 1896.

Messrs. Castner & Curran, Philadelphia, Pa.

GENTLEMEN: In reply to your letter of Nov. 6th will state that the word "Pocahontas" is a geographical name, and is therefore not registerable as a trade-mark.

Yours truly, POCAHONTAS COKE & COAL CO.
W. H. COFFMAN.

Dic., C. to D.

Exhibit "K," referred to in the foregoing affidavit of Castner, is in the words and figures following, to wit:

39 EXHIBIT "K."

Office of the Pocahontas Coke & Coal Co.

Average analysis of coke.	
Moisture	00.196
Fixed carbon	93.625
Volatile matter	00.494
Sulphur	00.677
Ash	05.004

(Picture.)

Our foundry & furnace coke was awarded the 1st premium at the World's fair in 1893.

R. R. weights at billing station- to govern all settlements. Contracts contingent upon matters beyond our control.

General factors & shippers of Pocahontas Flat Top coke; so low in ash that it requires no fluxing for foundry purposes.

BLUEFIELD, W. VA., *Dec.* 12, 1896.

Messrs. Castner & Curran, Philadelphia, Pa.

GENTLEMEN: Mr. J. Walter Douglass is claiming to be your attorney and writing a series of letters to customers of ours who are buying Pocahontas coal from us. We would advise you if this

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party is really your attorney that you have him stop the nonsense at once.

Yours truly, POCAHONTAS COKE & COAL CO.
W. H. COFFMAN.

Dic., C. to D.

Exhibit "I," referred to in the foregoing affidavit of Castner, is in the words and figures following, to wit:

EXHIBIT "I."

Pocahontas Coke and Coal Co., general factors for smokeless coal, crushed coke, foundry, furnace, and malting coke.

BLUEFIELD, W. VA., *Nov.* 2, 1896.

GENTLEMEN: Having recently contracted to take the entire output of a large mine producing smokeless coal in the Pocahontas Flat Top district, and being prepared to make prompt shipments of the lump and nut mixed, as well as the run-of-mine grade, we respectfully solicit your patronage at prices which have been ruling on this splendid semi-bituminous fuel. A number of coke ovens are now running at the plant, which consume all the slack produced in mining the coal; also this is about the hardest coal mined in the locality, therefore our mixed lump and nut will only carry such slack as is produced in transportation. It will be shipped promptly, and is the best domestic coal now produced in the Pocahontas Flat Top mining district. For steam purposes it has no equal. All mines now producing in the Pocahontas Flat Top district are working the same vein of coal.

We price the different grades of our smokeless coals as follows, per ton of 2,240 lbs. f. o. b. cars in your city, on tracks of —— or —— R. R., whom you may ask if they will absorb switching to your siding.

Mixed lump and nut $3.10
Run-of-mine steam coal $2.85
Smithing coal .....
Pocahontas egg, stove and nut crushed coke, each, at.....

Write for prices on Alma block coal and Dorchester coal.

The consignee is to pay all freights, and charge to our account. It is expressly understood that railroad weights at billing and shipping points are to govern all settlements, and that contracts are contingent upon matters beyond our control.

Yours truly, POCAHONTAS COKE & COAL CO.,
By W. H. COFFMAN COKE CO.,
Per P.

Exhibit "I," referred to in the foregoing affidavit of Castner, is in the words and figures following, to wit:

41 EXHIBIT "I."

Pocahontas Coke and Coal Co., general factors and shippers of Pocahontas Flat Top coal.

Average analysis of coal:

Moisture	.630
Fixed carbon	74.450
Volatile matter	19.310
Sulphur	.301
Ash	5.600

(Picture.)

BLUEFIELD, W. VA., *March* 4, 1897.

We desire to call attention to the fact that since November 1st we have been, are now and will continue to sell the Pocahontas coal, which is mined in the Pocahontas Flat Top coal district. These mines have been operated for several years, and it is highly probable that the best Pocahontas coal which Pocahontas customers have been receiving has been shipped from our mines. A number of coke ovens will be operated at this plant, which will take out any excess of slack.

We desire to enter into such correspondence with any party to whom we address this card, as will lead to the consummation of a deal for a supply of Pocahontas coal for a term of months.

Yours truly, POCAHONTAS COKE & COAL CO.,

By —— ——.

The affidavit of Henry B. Curran, referred to in the order of March 31, 1897 (above set forth), is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

STATE OF PENNSYLVANIA, *County of Philadelphia*, } *ss:*

42 Henry B. Curran, being duly sworn according to law, deposes and says: That he resides at Philadelphia, Pennsylvania, and is a member of the firm of Castner & Curran, the above-named complainants; that in 1883 he was treasurer and manager of the limited partnership association of Castner & Co., Limited, the predecessor of the present firm of Castner & Curran; that prior to 1884 and up to the present time the firms of Castner & Co.,

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Limited, and Castner & Curran, have been continuously engaged in the shipping and selling of coal mined in what is now known geologically as the Great Flat Top region of Virginia and West Virginia, which coal has been uniformally sold under the trademark "Pocahontas," that the said firm of Castner & Curran now handle the entire output of 37 mines in what is now known as the "Great Flat Top" coal region, and prior to November 1st, 1896, the said firm handled the entire output of all the mines in said region; that from their location and geological situation the output from the various mines varies greatly in purity and quality; that when the firm of Castner & Co., Limited, began to handle coal from the said region or field it established a system of inspection and selection of the coal prior to its shipment from each mine, and has continued that inspection to the present time; that the present firm of Castner & Curran place at the tipple of each mine a sub-inspector and several assistants, and have a superintendent and two chief inspectors, who control the said sub-inspectors and assistants; that during the year 1896, the system of inspection carried out by Castner & Curran, demanded the employment of from one to two hundred men, and the expenditure in salaries, etc., of many thousands of dollars; that only by this inspection and the expenditure of large sums of money, has the firm of Castner & Curran been enabled to bring the output of the various mines to a uniform standard of excellence, and the establishment of this standard, as aforesaid, has resulted in largely increased demand from year to year for "Pocahontas" coal from the said Castner & Curran, which demand in 1896 exceeded two million five hundred thousand tons; that the following are the rules for the inspection of coal which were formulated by Castner & Curran and their predecessors, Castner & Co., Limited, which rules are stringently observed by the employees of this deponent's firm.

Duties of the Superintendent of Inspection.

1. He shall make weekly reports to Castner & Curran regarding the general preparation of the coal produced throughout the field.

43 2. He shall employ and discharge assistant and sub-inspectors and direct them regarding the inspection of coal.

3. He shall have jurisdiction over the assistant and sub-inspectors, and shall entertain and decide all matters of appeal made by the operators from the decision of the assistant and sub-inspectors as to the rejection of coal and other matters pertaining to the inspection of coal. He shall keep himself acquainted with the capacity and condition and the workings of the mines, and endeavor to institute reforms in methods of mining in the interest of obtaining the best and purest coal possible.

4. He shall visit every tipple as often as circumstances will permit, and examine into the inspection that is being made, and when orders are received for any special quality of coal he shall proceed

to where the coal is to be loaded and superintend the loading of said order with all possible despatch.

5. All disputes regarding inspection shall be settled, if possible, between the superintendent of inspection and the operators or their superintendents, but if he is unable to come to a satisfactory conclusion with them, he shall advise Castner & Curran in writing of all the facts pertaining to the subject in dispute, and they will then discuss the matter direct with the operators complaining.

Duties of Sub-inspectors.

1. The sub-inspector must be civil and polite in attending to his duties, and do all in his power to assist in the prompt loading of coal at the tipple.

2. He shall attend to the duties of inspection during the working hours of the tipple to which he has been appointed, except that in the winter season he will not commence *inspection until it is light enough to permit him to perform his duties properly, nor continue the inspection in the evening after it is too dark to detect impurities.*

3. He shall keep a careful watch over the coal as it is being loaded into the cars. He shall not allow any of the following impurities to be loaded in the cars at any time, namely: That part of the vein of coal known as bone coal, sulphur bands and slates of all kinds, and all crop coal, whether colored red or peacock.

4. In the loading of "run-of-mine" coal the inspector shall be careful to see that there is at least 40 per cent. of lump coal
44 in every car loaded, and the unit of measure for lump in "run-of-mine" coal must be a cube, the sides of which are three inches.

5. In the rejection of any car, whether for too much slack or for impurities, the inspector shall notify the operator in writing of said rejection, taking a receipt for said notification, which receipt shall be given to the chief inspector.

6. If at any time the help which has been provided for the inspector at the tipple is not sufficient for the proper working of the tipple or becomes negligent, or in any way retards the work, the inspector shall immediately notify the operator, superintendent, or person in charge, of the facts and ask for relief.

7. In event of sub-inspector finding coal running too much slack at the tipple he will stop loading the car in question and arrange to have more lump put in it.

8. The sub-inspector shall make daily report of the preparation of coal inspected by him, handing one copy to the superintendent of the colliery, whose coal he has inspected, and forwarding duplicate copy to the superintendent of inspection.

9. The sub-inspector is hereby given to understand that his first or primary duty is to see that the coal is shipped in a marketable condition as instructed by these rules, and to facilitate the work as much as is consistent with the proper discharge of his duties. And is not to leave the tipple at any time during working hours unless

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authorized to do so by the superintendent of inspection or superintendent of the colliery.

10. If at any time the sub-inspector is compelled to leave his work through sickness or other necessary cause, he must put some person in his place subject to the approval of the chief inspector, and for whose conduct and work he will be held responsible.

The various grades of coal produced in the field are defined as follows:

By "lump" is meant coal that passes over parallel screen bars, spaced 3 inches apart. And a car to be classified as "lump" coal must contain not more than 10 per cent. of fine coal.

By "nut" is meant coal that passes through parallel screen bars spaced three inches apart and passes over bars ¾ of an inch apart. A car to be classified as "nut" coal must contain not more than 10 per cent. of slack.

By "slack" is meant everything that passes through bars spaced ¾ of an inch apart.

And further this deponent saith not.

HENRY B. CURRAN.

Sworn to and subscribed before me this 16th day of March, A. D. 1897.

HENRY C. ESLING,
Notary Public.

[SEAL.]

The affidavit of David H. Matson, referred to in said order, is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

STATE OF VIRGINIA, *County of Roanoke,* } *ss:*

David H. Matson, being duly sworn according to law, deposes and says that he resides at Roanoke, Virginia, and is the agent of the firm of Castner & Curran at said Roanoke; that for the past few weeks this deponent has been in receipt of numerous letters, postals, &c., from his customers calling attention to the fact that "Pocahontas" coal could be purchased of the Pocahontas Coke and Coal Company and W. H. Coffman, of Bluefield, West Virginia; that through the solicitations of the said Coffman and the Pocahontas Coke and Coal Company quantities of coal inferior in quality to Castner & Curran's coal have been sold upon the assumption that it was "Pocahontas" coal, and the sales of the said

Castner & Curran's coal usually made by this deponent, their agent, have lately thereby decreased many tons; that prior to the appearance of postal cards, letters and advertising matter issued by the said Coffman and by the Pocahontas Coke and Coal Com-
46 pany, all coal placed on the market and offered for sale as "Pocahontas" coal was exclusively that offered by the said Castner & Curran and their agents, and commanded a ready sale by reason of its superior quality; that this deponent, as well as the trade generally, have always understood and recognized the word "Pocahontas" to be a trade-mark or trade name, exclusively the property of the said firm of Castner & Curran, and used solely to designate the entire output controlled by the said firm of Castner & Curran; that this deponent has received complaints from parties who have purchased coal alleged to be "Pocahontas" coal from the aforesaid Coffman, to the effect that the coal so purchased was inferior in quality and purity to the "Pocahontas" coal sold by the said Castner & Curran; that the parties so complaining were L. D. Calfee, of Wytheville, Virginia, and Nicholas Sayers, of Pulaski, Virginia; that on or about the 3d day of February, 1897, he forwarded to Briesen & Knauth, of 229 Broadway, New York city, four boxes containing, respectively, a sample of W. H. Coffman's lump and nut coal, and samples of Pocahontas lump, Pocahontas nut, and Pocahontas run-of-mine coal; that these boxes were respectively marked "No. 1, sample of coal shipped from Indian Ridge colliery, and sold as Pocahontas lump and nut;" "No. 2, sample of Pocahontas nut coal;" "No. 3, sample of Pocahontas lump coal," and "No. 4, sample of Pocahontas run-of-mine coal;" that said boxes were loaded from cars containing said coal without any attempt at selection. And further this deponent saith not.

DAVID H. MATSON.

Sworn to and subscribed before me this 12th day of March, A. D. 1897.

GEO. L. HART,
Notary Public.

[SEAL.]

The affidavit of George A. Shirey, referred to in said order, is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of the Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

47 STATE OF WEST VIRGINIA, *County of Mercer,* } *ss:*

George A. Shirey, being duly sworn according to law, deposes and says: That he resides at Bluefield, West Virginia, and is the ship-

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ping agent for Castner & Curran, of Philadelphia, Pa., at said Bluefield, West Virginia; that he has been engaged in the shipping of coal and in other occupations relating thereto for the past twelve years, or since about the opening of the coal-fields of Virginia and West Virginia, now known as the Great Flat Top coal field or region; that the said Castner & Co., Limited, and Castner & Curran have continuously, from the year 1883 up to the present time, sold the coal from this region as "Pocahontas" coal; that prior to the acceptance of coal from the various operators, Castner & Co., Limited, and Castner & Curran, rigorously inspect at each tipple the coal as it is discharged to the cars and direct the removal of various impurities, such as crop and bone coal, sulphur bands and slate, and also require that in what is known as run-of-mine coal, or coal as it leaves the mine, shall contain at least forty per cent. of lump coal and not more than sixty per cent. of "slack" or fine coal; that by reason of this inspection the coal shipped by Castner & Curran and their predecessors, Castner & Co., Limited, always reached a high standard of excellence, and the demand for said coal has increased enormously from year to year up to the present time, the sales of Castner & Curran during the year 1896 amounting to upwards of two million five hundred thousand tons of "Pocahontas" coal; that this deponent is familiar with the output of what is known as the Indian Ridge mine; that previous to November 1st, 1896, the output of this mine was sold by Castner & Curran; that to render the coal from this mine fit for consumption a most rigid inspection was necessary prior to its shipment from the mine; that Castner & Curran had at this Indian Ridge mine prior to November 1st, 1896, one sub-inspector and four assistants, that number being absolutely necessary to bring the output up to the standard of the other coal sold by Castner & Curran as "Pocahontas" coal; that all coal from the Indian Ridge mine prior to November 1st, 1896, was shipped by this deponent solely as "run-of-mine" coal, for use for steaming and blacksmithing purposes, because there were no machinery or appliance at said mine whereby said run-of-mine coal could be graded or assorted into lump and nut coal to be adapted for domestic uses, and which coal so assorted commands a better price than the
48 run-of-mine coal upon the market; that since November 1st, 1896, Castner & Curran have not handled the coal of said Indian Ridge mine, neither have they inspected the same; but a W. H. Coffman has handled this coal, and what inspection has been done, has been done at the instance of the mine operators, the Indian Ridge Coal & Coke Company; that this deponent has seen many cars of this coal so shipped by the said Coffman, and the quality of said coal is greatly inferior to the coal formerly shipped by this deponent for the said firm of Castner & Curran from the said Indian Ridge mine; that deponent has seen coal shipped by said Coffman as lump, egg or nut coal, which was not lump, egg or nut coal, but was simply run of mine of inferior quality, and containing many impurities, such as bone coal, slate and sulphur bands; that the said W. H. Coffman is known personally to this deponent, and, from the office force which the said Coffman employs and from his methods

of transacting business, this deponent does not believe that the said Coffman is responsible financially to respond to such damages as might and will result to the business of said Castner & Curran from the sale of inferior coal by said Coffman, under the name "Pocahontas," in infringement of the trade-mark of said Castner and Curran; and further this deponent saith not.

GEORGE A. SHIREY.

Sworn to and subscribed before me this 13th day of March, A. D. 1897.

[SEAL.]

O. C. JENKINS,
Notary Public.

The affidavit of Albert S. Hurst, referred to in said order, is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

49 STATE OF WEST VIRGINIA, *County of Mercer,* } *ss:*

Albert S. Hurst, being duly sworn according to law, deposes and says that he resides at Bramwell, West Virginia, and, by occupation, is assistant inspector of coal for the firm of Castner & Curran; that he has been engaged in mining coal and in other occupations relating thereto for the past fourteen years; that he has been employed by said Castner & Curran as sub-inspector and assistant inspector of coal mined in what is now known as the Great Flat Top coal-field for the last seven years; that his duties as sub-inspector were to examine carefully all coal as it left the tipple of the mine and before it was discharged into the car, and, with the assistance of four helpers, to remove certain impurities therefrom, to wit: all "bone" coal, slate, sulphur bands, all "crop" coal and other impurities; that his duties also included the examination of various grades of coal shipped from the mine, such as "run-of-mine," nut and lump coal, and to ascertain whether or not each car contained the required percentage of lump coal or of nut coal, as required by the rules formulated by the said Castner & Curran; that since his appointment as assistant inspector his duties require him to visit each and every mine in his district, and to supervise the work of every sub-inspector at each mine; that he is acquainted with the character of the output from what is known as the Indian Ridge mine, which prior to November 1st, 1896, was one of the mines at which Thomas Q. Wilcox, of May-

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beury, W. Va., was sub-inspector for Castner & Curran; that the quality and purity of the output of said Indian Ridge mine is below the average of the other mines in the Great Flat Top region or field, and hence required much more rigid inspection to bring the output up to the standard prescribed by Castner & Curran; that the said Indian Ridge mine produces a coal in which what is known as "bone" is largely mixed with the pure coal, and slates of all kinds are likewise present in the product as it comes from the mines; that only by the exercise of the utmost care was this deponent, as the employee of Castner & Curran, enabled to bring said Indian Ridge coal to the required standard; that the said coal required for its inspection at all times one sub-inspector and four assistants; that since November 1st, 1896, this deponent has ceased to inspect the coal of said Indian Ridge mine, as the output is no longer controlled by said Castner & Curran; that this deponent has, however, seen car-loads of coal shipped from said mine during the month of January, 1897, and each car-load was greatly below the standard required by said Castner & Curran, and contained slate, bone coal, and other impurities, and the coal so shipped would have been rejected and would not have passed this deponent's inspection, nor would it have passed the inspection of any of Castner & Curran's sub-inspectors if said sub-inspectors had fulfilled their duties; that at the Indian Ridge mine there is no machinery and there are no appliances whereby the coal can be assorted or graded into lump or nut coal, but, on the contrary, all coal shipped therefrom is simply what is known as run of mine, and of a very inferior quality on account of its many impurities.

ALBERT S. HURST.

Sworn to and subscribed before me this 13th day of March, A. D. 1897.

WM. CRUMP,
Notary Public.

[SEAL.]

The affidavit of Thomas L. Wilcox, referred to in the said order, is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of the Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

STATE OF WEST VIRGINIA, *County of McDowell,* } *ss:*

Thomas Q. Wilcox, being duly sworn according to law, deposes and says that he resides at Maybeury, West Virginia, and is at pres-

ent employed by Castner & Curran as sub-inspector of coal at the Lick Branch colliery, near Maybeury, West Virginia; that previous to November 1st, 1896, he was in the employ of Castner & Curran, and was detailed as sub-inspector of the coal mined at the Indian Ridge colliery; that while employed by Castner & Curran
51 at the Indian Ridge colliery he had four assistants and gave to the coal there mined a very rigid inspection, because said coal was full of impurities such as bone and crop coal, slate and sulphur bands; that while in said Castner & Curran's employ he was not allowed to inspect coal and was directed not to permit of the loading of coal, while it was too dark to see the coal, as it frequently is in the morning and early in the evening during the winter months; that by reason of excessive care and watchfulness on the part of himself and assistants he was able while in the employ of Castner & Curran, to bring the output of said Indian Ridge colliery up to the high standard of excellence prescribed by said Castner & Curran; that from November 1st, 1896, to January 1st, 1897, he was employed directly by the Indian Ridge Coal and Coke Company and continued to fill the position of coal inspector at the said Indian Ridge colliery; that during this period of time the said Indian Ridge Coal and Coke Company reduced the number of deponent's assistants to two and even requested deponent to perform his duties with the assistance of but one helper, but on deponent's remonstrance the said Indian Ridge Coal and Coke Company did finally permit two helpers to assist deponent; that during the months in which he was employed by said company he was compelled to watch the loading of cars at seven o'clock in the morning, at which hour deponent was unable to see the coal and could not properly or at all inspect the same; that by reason of the reduction in the number of deponent's assistants and of the loading of cars at hours when deponent was unable to see the coal, the output from the Indian Ridge colliery during the months of November and December, 1896, fell in quality far below the standard previously maintained by deponent, whilst he was at this colliery in the employ of Castner and Curran; that the present inspector at Indian Ridge has but two helpers and, in deponent's opinion, said inspector is not qualified by experience or age to act as coal inspector; that during deponent's employment under Castner and Curran all coal from the Indian Ridge colliery was shipped as run-of-mine coal; that no machines or appliances were used by the Indian Ridge Coal and Coke Company up to January 1st, 1897, whereby other grades of coal, such as nut or lump, could be furnished; that during deponent's employment under the Indian Ridge Coal and Coke Company at Indian Ridge colliery run-of-mine coal was frequently shipped as nut and as lump coal.

THOMAS Q. WILCOX.

52 Sworn to and subscribed before me, this 13th day of March, A. D. 1897.

[SEAL.]

WM. CRUMP,
Notary Public.

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The affidavit of L. D. Calfee, referred to in said order, is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

STATE OF VIRGINIA, *County of Wythe,* } *ss:*

L. D. Calfee, being duly sworn according to law, deposes and says: That he is a resident of Wytheville, in the State of Virginia; that he is engaged in the coal and other mercantile business thereat; that heretofore he has purchased of Castner & Curran many tons of their "Pocahontas" coal, which has uniformly given satisfaction; that on or about the 13th day of November, 1896, he received from the Pocahontas Coke and Coal Company, of Bluefield, West Virginia, a postal card soliciting an order for "Pocahontas" coke, which postal was so worded as to lead this deponent to believe that he could purchase "Pocahontas" coal from the said Pocahontas Coke and Coal Company, of Bluefield, West Virginia; that in subsequent correspondence with W. H. Coffman, of said Pocahontas Coke and Coal Company, the said Coffman represented his alleged company's coal as "Pocahontas" coal, upon which representation this deponent purchased from said Pocahontas Coke and Coal Company about 75 tons of such coal; that the coal so purchased of the Pocahontas Coke and Coal Company was unsatisfactory, being full of impurities which are not present in the coal purchased by this deponent from the said Castner & Curran; and further this deponent saith not.

L. B. CALFEE.

53 Sworn to and subscribed before me, this 13th day of March, A. D. 1897.

W. B. KEGLEY,
Notary Public.

[SEAL.]

The affidavit of Nicholas A. Sayers, referred to in the said order, is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of the Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

STATE OF VIRGINIA, *County of Pulaski*, } *ss:*

Nicholas A. Sayers, being duly sworn according to law, deposes and says that he is 51 years of age, a resident of the town of Pulaski, county of Pulaski, and State of Virginia, where he is a merchant; that heretofore he has purchased of Castner & Curran many tons of their "Pocahontas" coal, which has uniformly given satisfaction; that on or about the 8th day of November, 1896, he received from the Pocahontas Coke and Coal Company, of Bluefield, West Virginia, an advertisement card worded in such manner as to lead this deponent to believe that he could purchase "Pocahontas" coal from the said Pocahontas Coke and Coal Company, of Bluefield, West Virginia; that in subsequent correspondence with W. H. Coffman, of said Pocahontas Coke and Coal Company, the said Coffman represented the coal of said company, to be the same as that being placed upon the market or offered by said Castner & Curran, upon which representation this deponent purchased from said Pocahontas Coke and Coal Company about 80 or 100 tons of such coal, fully believing the same was the "Pocahontas" coal of Castner & Curran; that the coal thus purchased of the said Pocahontas Coke and Coal Company was inferior in quality and purity to the "Pocahontas" coal purchased from the said Castner & Curran by this deponent.

NICHOLAS A. SAYERS.

54 Sworn to and subscribed before me this 15th day of M'ch, A. D. 1897.

B. E. WATSON,
Notary Public.

[SEAL.]

NOTE.—The affidavit of F. E. Dillie, referred to in said order, is not found among the original papers in the case on file in this office and was never filed.

L. B. DELLICKER, *Clerk.*

The affidavit of John M. Stockham, called "Stockmam" in said order and referred to therein, is in the words and figures following, to wit:

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United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of the Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendants.

STATE OF OHIO, }
County of Scioto, } *ss:*

John M. Stockham, being duly sworn according to law, deposes and says: That he is engaged in selling coal in the city of Portsmouth, Ohio; that heretofore he has purchased of Castner & Curran many tons of their "Pocahontas" coal, which has uniformly given satisfaction; that on or about the 1st day of November, 1896, he received by mail from the Pocahontas Coke & Coal Company of Bluefield, West Virginia, a postal card marked "Exhibit R," on the back of which was a quotation of prices for coal worded in such a manner as to lead this deponent to believe that he could purchase "Pocahontas" coal from the Pocahontas Coke & Coal Company of Bluefield, West Virginia, and giving varying prices on different sizes of coal, differing from those of the said Castner & Curran; that in subsequent correspondence had with W. H. Coffman, of the said Pocahontas Coke and Coal Company, the said Coffman represented the coal of his said company to be the same as that being placed upon the market or offered by the said Castner & Curran,
55 upon which representation this deponent purchased from the said Pocahontas Coke & Coal Company one (1) car-load of said coal, fully believing the same was equal in quality to the genuine "Pocahontas" coal of Castner & Curran.

JOHN M. STOCKHAM.

Sworn to and subscribed before me this 15th day of March, A. D. 1897.

[SEAL.]

A. T. McCORMICK,
Notary Public, Scioto Co., Ohio.

"Exhibit R," referred to in the foregoing affidavit, is in the words and figures following, to wit:

"EXHIBIT R."

Pocahontas Coke and Coal Co., general factors for smokeless coal, crushed coke, foundry, furnace, and malting coke.

BLUEFIELD, W. VA., 11, 16, 1896.

GENTLEMEN: Having recently contracted to take the entire output of a large mine producing smokeless coal in the Pocahontas Flat

Top district, and being prepared to make prompt shipments of the lump and egg mixed, as well as *as* the run-of-mine grade, we respectfully solicit your patronage at prices which have been ruling on this splendid semi bituminous fuel. A number of coke ovens are now running at the plant, which consume all the slack produced in mining the coal; also this is about the hardest coal mined in the locality, therefore our mixed lump and egg will only carry such slack as is produced in transportation. It will be shipped promptly, and is the best domestic coal now produced in the Pocahontas Flat Top mining district. For steam purposes it has no equal. All mines now producing in the Pocahontas Flat Top district are working the same vein of coal.

We price the different grades of our smokeless coals as follows, per ton of 2,000 lbs. f. o. b. cars in your city, on tracks of Scioto val. or ..... R. R., whom you may ask if they will absorb switching to your siding:

Mixed lump and egg	$1.85
Run-of-mine steam coal.....	$1.75
Smithing coal.....	$
Pocahontas egg, stove and nut crushed coke, each, at.....	$2.90

56 Write for prices on Alma block coal and Dorchester coal.

The consignee is to pay all freights, and charge to our account. It is expressly understood that railroad weights at billing and shipping points are to govern all settlements, and that contracts are contingent upon matters beyond our control.

Yours truly,

POCAHONTAS COKE & COAL CO.,
By W. H. COFFMAN COKE CO.,
Per M.

The affidavit of Charles E. Wales, referred to in said order, is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of the Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

STATE OF MINNESOTA, } *ss:*
County of Hennepin, }

Charles E. Wales, being duly sworn according to law, deposes and says that he is the president of the Pioneer Fuel Company, having its principal office at Minneapolis, Minnesota; that the said company deals in coal and handles large quantities of "Pocahontas"

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coal, which it receives from Castner & Curran, of Philadelphia, Pennsylvania; that up to about the 20th day of November, 1896, the only coal known in the markets of Minnesota and adjoining States as "Pocahontas" coal was that received by this deponent's company and other companies from the said Castner & Curran, or their agents; that about the time last mentioned the Northwestern Fuel Company, of Minneapolis, Minnesota, began to display signs advertising the sale of "Pocahontas smokeless" coal; that the coal thus advertised is not the "Pocahontas" coal of Castner & Curran;
57 that deponent caused a ton of coal to be purchased from the said Northwestern Fuel Company by one A. Coleman, and the said purchaser was assured by said Northwestern Fuel Company that the coal delivered was genuine "Pocahontas" coal, and the purchaser of said ton of coal received a receipt, in which the coal delivered was designated as "Pocahontas;" said receipt is hereto annexed, and marked Exhibit "K K;" and further this deponent saith not.

CHARLES E. WALES.

Sworn to and subscribed before me this 15th day of March, A. D. 1897.

[SEAL.] R. L. McMILLAN,
Notary Public.

Exhibit "K K," referred to in the foregoing affidavit, is in the words and figures following, to wit:

"EXHIBIT K K."

(N. W. F. Co.)

"Scranton coal."

Northwestern Fuel Co., 304 Nicollet Ave.

MINNEAPOLIS, MINN., *Nov.* 27, 1896.

Received of A. Coleman..... .... $5.50

five... ... . $\frac{50}{100}$ dollars

in payment 2,000 Pocahontas.

NORTHWESTERN FUEL CO.,
By J. PAINTER, *Cashier.*

The affidavit of Fred. W. Barney, referred to in said order, is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of the Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

58 STATE OF MICHIGAN, *County of Calhoun*, } *ss:*

Fred. W. Barney, of Battle Creek, Michigan, being duly sworn, deposes and says: That he is a member of the firm of Barney & Kirkpatrick, dealers in coal at Battle Creek, Michigan; that his said firm deals in and handles large quantities of "Pocahontas" coal, which they receive from the agents of Castner & Curran, of Philadelphia, Pennsylvania; that up to the 27th day of November, 1896, the only coal known in the markets of Michigan and adjoining States as "Pocahontas" coal, was that received by this deponent's firm and other concerns, from the said Castner & Curran, or their duly authorized agents; that about the time above mentioned the firm of Rowe & Woodruff, of said Battle Creek, dealers in coal, commenced to sell a coal in the market under the name of "Pocahontas;" that on the above date the said Rowe, of said firm of Rowe & Woodruff, to confirm the foregoing statement, called upon this deponent and informed him that his firm had "Pocahontas" coal to sell, and were selling it under that name; that the said Rowe was then and there shown a notice issued by the said Castner & Curran, cautioning the public and dealers against any infringement of their trade-mark, and the said Rowe read it and said he did not care anything about that notice, and stated "any one who had money could buy any kind of coal and sell any kind that he wanted to;" that this deponent is informed, and believes, the said firm of Rowe & Woodruff is a confederate or agent of one W. H. Coffman, of Bluefield, West Virginia, trading under the names of the W. H. Coffman Coke Co. and the Pocahontas Coke & Coal Company thereat, and that the said firm is conspiring with the said Coffman to unlawfully market coal under the said word symbol "Pocahontas," in violation of the recognized trade-mark rights of the said Castner & Curran, and to their great and irreparable damage and injury; and further this deponent saith not.

FRED. W. BARNEY.

Sworn to and subscribed before me, this 16th day of March, A. D. 1897.

[SEAL.] FREDERICK A. ALLWALDT,
Notary Public in and for Calhoun County, Michigan.

The affidavit of Horace N. Claxton, referred to in said order, is in the words and figures following, to wit:

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59 United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartness, Trading under the Firm Name and Style of *Chestner* & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of the Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

STATE OF ILLINOIS, *County of Cook,* } *ss:*

Horace N. Claxton, being duly sworn according to law, deposes and says that he is the agent of the firm of Castner & Curran, and has his office at Chicago, Illinois; that for some time past he has been in receipt of numerous letters, postals, &c., from his customers calling attention to the fact that "Pocahontas" coal could be purchased of the Pocahontas Coke and Coal Company and W. H. Coffman, of Bluefield, West Virginia, at reduced prices; that some of said customers have demanded a reduction in price in "Pocahontas" coal sold by his said firm of Castner & Curran, whilst others have transferred their orders to the said Pocahontas Coke and Coal Company and W. H. Coffman; that by reason of the solicitation of the said Coffman and the Pocahontas Coke and Coal Company tons of the spurious "Pocahontas" coal have been sold, and the sales of the said Castner & Curran usually made by this deponent, their agent, have thereby decreased many tons; that prior to the appearance of said postal cards, letters and advertising matter issued by the Coffman and the Pocahontas Coke and Coal Company, all coal placed on the market and offered for sale as "Pocahontas" coal was exclusively that offered by the said Castner & Curran and their agents and commanded a ready sale by reason of its superior quality; that this deponent as well as the trade generally have always understood and recognized the word "Pocahontas" to be a trade-mark or trade name exclusively the property of the said firm of Castner & Curran, and used continuously by them to designate the entire output controlled by the said firm of Castner & Curran; that lately he has learned that F. B. Newell & Co., the Chicago agents of W. H. Coffman, or the Pocahontas Coke and Coal Company, have been distributing among the coal trade many cards substantially like
60 Exhibit "O" hereto annexed, whereon they advertise in a deceptive manner the sale of "Pocahont-s coal," which coal has heretofore only been dealt in by this deponent's firm of Castner & Curran; that the said F. B. Newell & Co. are also distributing cards and other advertising matter whereon there appears in large type the words "Pocahontas coal," and in smaller type after "Pocahontas" the words "Coke and Coal Co.'s celebrated" in substantially the manner indicated in Exhibit "P" hereto annexed; that the customers of this deponent have been receiving these cards in large

quantities recently and in consequence this deponent's trade has decreased many tons; that on or about the 24th day of January, 1897, he received a letter from Briesen & Knauth, of 229 Broadway, New York city, requesting deponent to ship to the said Briesen & Knauth samples of "Pocahontas" nut, "Pocahontas" lump and a sample of W. H. Coffman's lump and nut coal; that, in response to said request, deponent on the 1st day of February, 1897, did ship three boxes of coal to the said Briesen & Knauth, one of said boxes being marked "Pocahontas nut," another "Pocahontas lump," and the third "Coffman's lump and nut;" that the samples of "Pocahontas" nut and of "Pocahontas" lump enclosed in said boxes were taken from cars containing Castner & Curran's coal, and were shoveled out of said cars without any attempt at selection; that the sample of Coffman's lump and nut was similarly shoveled out of a car containing coal consigned from W. H. Coffman, of Bluefield, W. Va., and labeled lump and nut coal; and further this deponent saith not.

HORACE N. CLAXTON.

Sworn to and subscribed before me this 13 day of March, A. D. 1897.

HENRY G. FRITSCH,
[SEAL.] *Notary Public.*

Exhibit "O," referred to in the foregoing affidavit, is in the words and figures following, to wit:

61 EXHIBIT "O."

F. B. Newell & Co., 355 Dearborn St., coal and coke, Chicago.

Pocahontas smokeless coal constantly in transit.

A trial order will result in a steady trade with you. It never fails to give complete satisfaction.

Our prices are always in line.

Orders filled same day received. Get the genuine article from yours truly, F. B. Newell & Co., 355 Dearborn St., Ellsworth bldg., Chicago, northwestern distributers.

When you get the Pocahontas smokeless coal you get the best product of the celebrated Flat Top West Virginia district.

Exhibit "P," referred to in the foregoing affidavit, is in the words and figures following, to wit:

BLEED. THROUGH POOR COPY

EXHIBIT "P."

F. B. Newell & Co., 355 Dearborn St., coal and coke, Chicago. Pocahontas Coke & Coal Co.'s celebrated coal constantly in transit.

A trial order will result in a steady trade with you. It never fails to give complete satisfaction.

Our prices are always in line.

Orders filled same day received. Get the genuine article from yours truly, F. B. Newell & Co., 355 Dearborn St., Ellsworth bldg., Chicago, northwestern distributors.

When you get the Pocahontas Coke & Coal Co.'s coal you get the best product of the celebrated Flat Top West Virginia district.

62 The affidavit of George E. Alkins, referred to in said order, is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

STATE OF OHIO, *County of Franklin,* } *ss:*

George E. Alkins, being duly sworn according to law, deposes and says that he is an agent of the firm of Castner & Curran, and has his office at Columbus, Ohio; that for the past few weeks he has been in receipt of numerous letters, postals, &c., from his customers calling attention to the fact that "Pocahontas" coal could be purchased of the Pocahontas Coke & Coal Company and W. H. Coffman, of Bluefield, West Virginia, and from their agents at reduced prices, one of said letters being hereto annexed and marked Exhibit "M;" that some of said customers have demanded a reduction in price in "Pocahontas" coal sold by his said firm of Castner & Curran, whilst others have transferred their orders to the said Pocahontas Coke and Coal Company and W. H. Coffman; that by reason of the solicitation of the said Coffman and the Pocahontas Coke and Coal Company tons of the spurious "Pocahontas" coal have been sold, and the sales of the said Castner & Curran usually made by this deponent, their agent, have thereby decreased many tons owing to the unfair competition of the said Coffman; that prior to the appearance lately of postal cards, letters and advertising matter

issued by the said Coffman and the Pocahontas Coke and Coal Company, all coal placed on the market and offered for sale as "Pocahontas" coal was exclusively that offered by the said Castner & Curran and their agents, and commanded a ready sale by reason of its superior quality; that this deponent as well as the trade generally have always understood and recognized the word "Pocahontas" to be a trade-mark or trade name exclusively the property of
63 the said firm of Castner & Curran, and used continuously to designate the entire output of coal controlled by the said firm of Castner & Curran; that on or about the 24th day of January, 1897, he received a letter from Briesen & Knauth, of No. 229 Broadway, New York city, requesting deponent to ship to the said Briesen & Knauth samples of Castner & Curran's Pocahontas nut and Pocahontas lump coal and a sample of W. H. Coffman's lump and nut coal; that in response to said request deponent did on the 28th day of January, 1897, ship to the said Briesen & Knauth three boxes of coal, namely: one containing Castner & Curran's Pocahontas nut coal, and labeled inside and outside as follows:

No. 1. This sample of *nut coal* was taken from N. & W. 41053, waybilled October 13th, 1896, from Crozer mines to G. E. Alkins, agent, care of N. & W. ag't, Chillicothe, Ohio; the car being transferred October 14th, 1896, to M. A. Suydam & Co., Columbus, Ohio.

A second box containing Castner & Curran's Pocahontas lump coal, and labeled as follows:

No. 2. This sample of *lump coal* was taken from N. & W. 40618, waybilled January 13th, 1897, from Turkey Gap mines to M. A. Suydam & Co., Columbus, Ohio.

And a third box containing coal purchased of the Franklin Fuel Company on January 27th, 1897, as "Poca." coal, and labeled as follows:

No. 3. This sample of *nut and lump coal* was taken from a half ton of coal purchased from the Franklin Fuel Company January 27th, 1897, as Poca. coal. The Franklin Fuel Company of Columbus, Ohio, having received from W. H. Coffman, N. & W. 40393, waybilled December 8th, 1896, containing nut and lump coal.

That the samples of Pocahontas lump and nut coal were taken direct from cars shipped by Castner & Curran from the mines indicated in said labels, and without selection; that the sample of "Poca." coal was taken from a half ton of coal purchased at deponent's request from the Franklin Fuel Company, consignees of W. H. Coffman of the car indicated in the label on said box, a receipt for said coal so purchased being hereto annexed and made part of this affidavit; that no attempt at selection was made with respect to said "Poca." coal.

GEORGE EDWIN ALKINS.

64 Sworn to and subscribed before me this 12th day of March, A. D. 1897.

WALTER HAMILTON,

[SEAL.] *Notary Public in and for Franklin County, Ohio.*

BLEED. THROUGH POOR COPY

The receipt referred to in said affidavit is in the words and figures following, to wit:

J. S. Jones, president, Chicago; C. F. Evans, vice-pres. and treas., Columbus, O.

Shippers and jobbers of anthracite and bituminous coals and coke.

Exclusive sales agents for XX and Congo mines and smokeless coal.

COLUMBUS, OHIO, *Jan.* 29, 1897.

Mr. Hamilton to the Franklin Fuel Co., Dr.

Central office and yards: 468 North High St.
Yard offices: Mt. Vernon Ave. next to C., S. & H. freight depot; 5th Ave. and C., S. & H. R'y, 428 Neil street.
Long-distance telephone: 1084.

1897. 1,000 Poca..... ..... $165

Paid.

THE FRANKLIN FUEL CO.
S.

Exhibit "M," referred to in said affidavit, is in the words and figures following, to wit:

EXHIBIT "M."

12, 1, '96.
Ans. See L. B.
Long-distance telephone: No. 1246.

F. M. Kirk & Co., coal and coke, New England building; contracting agents for Pocahontas smokeless coal.

Ontario & Western anthracite, "Keystone" & "Hazel," Hocking, Youghiogheny, Jackson Hill, Connellsville, Pocahontas, and Black Diamond coke.

Castner & Curran, Board of Trade building, Columbus, Ohio.

CLEVELAND, *Nov.* 30, 1896.

G. E. Alkins, Esq., Columbus, O.

65 DEAR SIR: Inclosed please find postal from the Pocahontas Coal & Coke Co., which we secured through the Klages Coal & Ice Co., of Akron. Nearly every day we have some one of our trade cancel their orders. We do hope within the next week or so to be informed that your people have succeeded in stopping this party from interfering with our trade. You have no idea of the trouble it is causing us: we receive letters from all over our territory, parties advising us that we must make the same figure or our orders will be cancelled. It is almost impossible to go out now and get any more trade, as this party has placed his postals to every dealer in northern Ohio. We hear of them from every source.

Would it not be well to forward this to Philadelphia, that they may see the position we are placed in?

Yours truly, F. M. KIRK & CO.

The affidavit of Henry R. Mather, referred to in said order, is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

STATE OF OHIO, } *ss:*
County of Hamilton, }

Henry R. Mather, being duly sworn according to law, deposes and says that he is agent for the firm of Castner & Curran, of Philadelphia, Pa., and has his office at Cincinnati, Ohio; that for several weeks past he has been in receipt of numerous letters, postals, &c., from his customers calling attention to the fact that "Pocahontas" coal could be purchased of the Pocahontas Coke and Coal Company and W. H. Coffman, of Bluefield, West Virginia, at reduced prices; that some of said customers have demanded a reduction in price in "Pocahontas" coal sold by his said firm of Castner & Curran, whilst others have transferred their orders to the said Pocahontas Coke and Coal Company and W. H. Coffman; that by reason of the
66 solicitation of the said Coffman and the Pocahontas Coke and Coal Company, tons of spurious "Pocahontas" coal have been sold, and the sales of the said Castner & Curran usually made by this deponent, their agent, have thereby decreased many tons; that prior to the appearance of the said postal cards, letters and advertising matter issued by the said Coffman and the Pocahontas Coke and Coal Company, all coal placed on the market and offered for sale as "Pocahontas" coal was exclusively that offered by the said Castner & Curran and their agents, and commanded a ready sale by reason of its superior quality; that this deponent, as well as the trade generally, have always understood and recognized the word "Pocahontas" to be a trade-mark, or trade name, exclusively the property of the said firm of Castner & Curran, and used continuously to designate the entire output controlled by the said firm of Castner & Curran; and further this deponent saith not.

HENRY R. MATHER.

Sworn to and subscribed before me, this 13th day of March, A. D. 1897.

[SEAL.] EDWARD J. DEMPSEY,
Notary Public in & for Hamilton County, State of Ohio.

BLEED. THROUGH POOR COPY

The affidavit of Arthur V. Bri-sen, referred to in the said order, is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of the Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

STATE OF NEW YORK, *County of New York,* } *ss:*

Arthur V. Briesen, being duly sworn according to law, deposes and says that he resides at New York city, and is by profession an attorney and counsellor at law and a member of the firm of Briesen & Knauth; that he is the counsel for Castner & Curran, the above-named complainants; that on various dates between the 23rd
67 day of January, 1897, and the 16th day of February, 1897, deponent received by express ten certain boxes of coal, as follows:

From D. H. Matson, Roanoke, Va., 4 boxes of coal marked:

"No. 1. Sample shipped from Indian Ridge colliery and sold as Pocahontas lump and nut."

"No. 2. Sample Pocahontas nut."

"No. 3. Sample Pocahontas lump."

"No. 4. Sample of Pocahontas run of mine coal."

From George E. Alkins, Columbus, O., three boxes of coal marked:

"No. 1. This sample of nut coal was taken from N. & W. 41053, waybilled October 13th, 1896, from Crozer mines, to G. E. Alkins, agent, care N. & W., ag't, Chillicothe, Ohio, the car being transferred October 14, 1896, to M. A. Suydam & Co., Columbus, Ohio.

G. E. ALKINS, *Ag't.*"

"Columbus, Ohio, Jan'y 27th, 1897."

"No. 2. This sample of lump coal was taken from N. & W., 40618, waybilled January 13th, 1897, from Turkey Gap mines, to M. A. Suydam & Company, Columbus, Ohio.

GEO. E. ALKINS, *Ag't.*

Columbus, Ohio, Jan. 27th, 1897."

"No. 3. This sample of nut and lump coal was taken from a half-ton of coal purchased from the Franklin Fuel Company January 27th, 1897, as Poca. coal; the Franklin Fuel Company of Columbus, Ohio, having received from W. H. Coffman, N. & W. 40393, waybilled December 8th, 1896, containing nut and lump coal.

G. E. ALKINS, *Ag't.*

Columbus, Ohio, January 27th, 1897."

From Horace N. Claxton, Chicago, Ill., three boxes of coal marked: "Sample of coal shipped and sold by the Indian Ridge Co. as Pocahontas nut and lump coal, taken from C. H. V. & T. car No. 13338, shipped January 12th, 1897, and consigned to the Bell & Zollar Coal Co., Chicago, Ill."

68 "Sample of Pocahontas lump coal taken from car N. & W. No. 5207, shipped on January 22nd, 1897, to F. G. Hartwell Co., Chicago, Ill."

"Sample of Pocahontas nut coal taken from car N. & W. No. 41382, shipped on December 24th, 1896, to F. G. Hartwell Co., Chicago, Ill."

that deponent will retain said boxes in his possession until the hearing of the motion for preliminary injunction about to be made in the above-entitled cause, and will produce said boxes and their contents in the same condition in which they were received by this deponent; and further this deponent saith not.

A. V. BRIESEN.

Sworn to and subscribed before me this 13th day of March, A. D. 1897.

HARRY M. TURK,
Notary Public, N. Y. County.

[SEAL.]

An affidavit of Frederick J. Kimball was also filed on said 31st day of March, 1897, which affidavit is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

STATE OF PENNSYLVANIA, *County of Philadelphia*, } *ss:*

Frederick J. Kimball, of Delaware county, Pennsylvania, being duly sworn according to law, depose and says that he was president of the Norfolk and Western Railroad Company for thirteen years, beginning with the year 1883, and for several years prior thereto he was vice-president of said company; that during the year 1881, while he was connected with said company, he explored that

69 portion of Tazewell county, Virginia, at which the coal mine of the Southwest Virginia Improvement Company is now situated, and found that coal of a bituminous or semi-bituminous character could be easily mined in large quantities at that place; that this deponent was instrumental in securing capital for the de-

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velopment of the region thereabouts, and succeeded in interesting capitalists who acquired the charter of the Southwest Virginia Improvement Company, a company which had been incorporated by act of the legislature of Virginia, in March 1880, and the said company then began the erection of the necessary plant and the construction of the necessary machinery for the mining of coal in said Tazewell county, Virginia; that the mines of said Southwest Virginia Improvement Company were opened and developed early in the year 1882, and before the middle of said year, but coal was not shipped in large quantities until the completion of the branch of the Norfolk and Western Railroad Company to the coal-field and mine openings, designated the "East" mine and "West" mine which was in the year 1883; that prior to the building of this branch railroad and opening of the said mines, this section of the country was a wilderness; that deponent remembers the history of these early transactions, because as an officer of said Norfolk and Western Railroad Company he was interested in developing traffic for his railroad from the said mines; that some time about the middle of the year 1882, the said Southwest Virginia Improvement Company called their settlement and post-office Pocahontas, and upon the completion of the branch of said road the station was called "Pocahontas" and the coal mined and marketed under the name and style of "Pocahontas" coal, and thereafter, to wit: in 1884 the town of Pocahontas was incorporated, as appears by a certified copy of its charter marked "Exhibit Pocahontas Charter" hereto annexed. The said coal was sold as "Pocahontas" coal in 1883, as appears by a copy of the "Exhibit Collins Receipt" hereto annexed. The mining town of Pocahontas was created by the above efforts to mine said coal, and did not exist until the miners and others who took part in these efforts settled in said wilderness, and further deponent saith not.

FREDERICK J. KIMBALL.

Sworn to and subscribed before me, this 26th day of March, A. D. 1897.

J. WALTER DOUGLAS,
[SEAL] *Notary Public.*

70 "Exhibit Pocahontas Charter" referred to in the foregoing affidavit, is in the words and figures following, to wit:

COMMONWEALTH OF VIRGINIA:

I, Chas. T. O'Ferrall, governor of the Commonwealth of Virginia, certify that J. Bell Bigger, whose name is signed to the within copy of an act of assembly to incorporate the town of Pocahontas, approved Jan'y 31, 1884, bearing date the 3rd day of March, 1897, is, and was at the time of signing, clerk of the house of delegates and keeper of the rolls of Virginia, duly elected and qualified; that he is authorized by the laws of this State to make and sign such copy of act, and that to all his official acts full faith, credit and authority are due and ought to be given.

In testimony whereof I have hereunto set my hand as governor, and caused the great seal of the Commonwealth to be fixed. Done at the city of Richmond this 3d day of March, in the year of our Lord one thousand eight hundred and ninety-seven, and in the 121st year of the Commonwealth.

Great Seal Commonwealth of Virginia.

CHAS. T. O'FERRALL.

By the governor:
J. T. LAWLESS,
Secretary of the Commonwealth and Keeper of the Seals.

An act to incorporate the town of Pocahontas.

(Approved January 31, 1884.)

1. Be it enacted by the General Assembly of Virginia, That all the territory in Tazewell county, included in the following boundaries: Beginning at the point where the county line between Mercer and Tazewell crosses Laurel creek; thence along said line north forty-two degrees forty-five west, for seven thousand and eight feet to a corner; thence south sixty-one degrees west, for five thou-
71 sand four hundred and thirty feet to a corner; thence south forty-two degrees forty-five east, for four thousand four hundred and ten feet to a corner; thence south eleven degrees thirty east, for one thousand one hundred and twenty-two feet to a corner; thence south twenty-eight and one-fourth degrees east, for one thousand one hundred and twenty-two feet to a corner; thence north thirty-six degrees thirty east, for five hundred ninety-four feet to a corner; thence north fifty-one and three-fourth degrees, east for three hundred feet to a corner; thence south twenty-nine degrees east, for one thousand five hundred fifty-one feet to a corner; thence south sixty-eight and one-half degrees east, for two thousand two hundred and seventy-seven feet to a corner; thence north, sixty-one degrees east, for three hundred and eighty-five feet to a corner; thence north twenty-nine degrees west, for one hundred and fifty feet to a corner; thence north sixty-one degrees east, for five hundred and ninety feet to a corner; thence south twenty-nine degrees east, for one hundred and seventy-five feet to a corner; thence south sixty-one degrees west, for two hundred twenty feet to a corner; thence south twenty-nine degrees east, for two hundred feet to a corner; thence south sixty-one degrees west, for one hundred and twenty-five feet to a corner; thence south twenty-nine degrees east, for one hundred and seventy-five feet to a corner; thence south sixty-one degrees west, for two hundred and twenty feet to a corner; thence south twenty-nine degrees east, for two hundred feet to a corner; thence south sixty-one degrees west, for one hundred and twenty-five feet to a corner; thence south twenty-nine degrees east, for one hundred and seventy-five feet to a corner; thence north sixty-one degrees east, for four hundred and fifty feet to a corner; thence north twenty-nine degrees west, for three hundred and seventy-five

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feet to a corner; thence north sixty-one degrees east, for fifty feet to a corner; thence north twenty-nine degrees west, for one hundred and seventy-five feet to a corner; thence north sixty-one degrees east, for fifty feet to a corner; thence south twenty-nine degrees east, for two hundred and seventy-five feet to a corner; thence north sixty-one degrees east, for one hundred feet to a corner; thence north twenty-nine degrees west, for two hundred and seventy-five feet to a corner; thence north sixty-one degrees east, for five hundred and forty feet to a corner; thence south twenty-nine degrees east, for one hundred and fifty feet to a corner; thence north sixty-one degrees east, for one hundred and twenty feet to a corner; thence north fifty-two degrees twenty east, for one thousand
72 and ninety-five feet to a corner; thence north thirty-one degrees east, for one thousand one hundred and ten feet to a corner; thence north forty-two degrees forty-five west, for one thousand five hundred and sixty-two feet to the point of beginning, shall constitute the town of Pocahontas; and the inhabitants within said boundaries, and their successors, shall be a corporation under the name and style of the town of Pocahontas, and the fifty-fourth and fifty-sixth chapters of the Code of Virginia, edition of eighteen hundred and seventy-three, as far as consistent with this act, shall be applicable to said town; and the council of said town may, from time to time, enlarge the boundaries of said town by adding thereto the lots of such persons as desire to be included in said corporation, and who shall make application therefor to said council.

2. The government of the said town shall be vested in a mayor and council of five, who shall be residents of said town, and shall be elected annually on the fourth Thursday of May, by those qualified to vote for members of the General Assembly, and who shall have been residents within the boundaries of the corporation for three months next preceding the election, and by no other person. There shall be five days' notice of all elections by posting notices at three or more public places within the corporation. The mayor and council shall remain in office until their successors are elected and qualified in their stead; but no longer.

3. The council shall fix and determine the place where said elections shall be held; shall prescribe the manner of declaring and certifying elections, of deciding between two or more where the number of votes shall be equal, and of filling vacancies in said board a majority of said council shall constitute a quorum to do business.

4. The council shall appoint annually a sergeant, recorder and treasurer, and shall fix their compensation and prescribe their duties, and require such bonds as may be deemed proper.

5. The sergeant of said town, who shall from time to time be appointed under this act, shall have the like rights of distress and a power for collecting the taxes and levies made by said council of said town as sheriffs in similar cases, and shall be entitled to the same or like fees and commissions, for collecting said taxes and levies, as are allowed sheriffs for collecting county levies and in the service and return of all processes, and in the collection of all fines

arising under the authority of this act or of any by-laws
73 made in pursuance thereof. He shall have and possess the same rights and powers and be entitled to the same or like fees and commissions as allowed by law to sheriffs for similar services.

6. The sergeant of said town, upon entering into bond in the county court of Tazewell county, in the manner prescribed by law for constables, and with such conditions as constables are required by law to enter into, shall have all the power and authority of a constable in the collection of money by warrant or otherwise, and to execute any and all process to him directed, or which might have been so directed; and shall and may do and perform all acts, execute and return such warrants and be liable in the same manner and to the same extent that constables are by the laws now in force.

7. The sergeant of said town shall be a conservator of the peace and shall have power to arrest in said town, or anywhere within Tazewell county, upon a warrant issued by the mayor, recorder or councilmen, any person charged with a violation of the laws or ordinances of said town; and when a violation of the laws or ordinances of said town *are* committed in his presence, he shall have authority and power without warrant, forthwith to arrest the offender and carry him before some conservator of the peace of said town to be dealt with according to law.

8. The mayor, recorder and councilmen, and each of them, shall and may exercise all jurisdiction, civil and criminal, now by law conferred upon justices of the peace; shall preserve peace and good order in said town, and to this end they and each of them shall be a conservator of the peace with all the power conferred upon conservators of the peace by chapter one hundred and ninety-six of the Code of Virginia.

9. The mayor, recorder and councilmen of said town, and each of them, upon taking oaths required by law to be taken by justices of the peace, shall each have authority and jurisdiction to hear and determine all matters of which a justice of the peace would have jurisdiction, and to hear and determine all controversies arising under the laws and ordinances of said town, and to issue any and all proper process, whether mesne or final, which may be necessary to enforce their judgment and authority.

10. The council of said town shall be, and is hereby invested with the power, and charged with the duty of taking care of
74 the poor within the limits of said town; and said council and the superintendent of the poor for Tazewell county are authorized and empowered to contract on such terms as they may agree upon, for the removal of such poor persons as may become a charge upon said town, and for their care and support at said poor-house.

11. The said council shall have power and authority to lay and collect, and apply to the maintenance of public free schools in said town, annually, a sum equal to what the inhabitants and property of said town would have to pay, annually, to the county of Tazewell for public free school purposes, if this act had not been passed.

BLEED THROUGH POOR COPY

12. The council shall have power to make accurate bounds of existing streets and to compel the removal of obstructions therefrom, and to lay off and have new streets, alleys and sidewalks, and to provide and protect shade trees thereon. The council of said town shall have the same jurisdiction for condemning land for streets, alleys and sidewalks for said town, as the county court has for condemning lands for roads in the county. The council shall further have power to provide against and prevent accidents by fire; to establish and regulate markets; to prevent the running at large of hogs, dogs, horses and other animals; to prevent the cumbering of streets, sidewalks and alleys in any manner whatever; to make sanitary regulations in reference to contagious or other diseases; to regulate the building of all houses, stables, privies, hog pens and slaughter-houses; to abate nuisances at the expense of those who cause them; to restrain and punish drunkards, vagrants, mendicants and street beggars; to appoint police and prescribe their duties and compensation; and to make, pass and ordain such rules, regulations and by-laws as they may deem necessary and proper, for the internal and general good, safety, health and convenience of the said town and inhabitants thereof, and for enforcing the provisions of this charter. They shall punish all violators of law, by fine or imprisonment, or both, in the discretion of the officer or officers trying the offenders; provided the accused shall have the right of appeal to the county court in all cases whatsoever, whenever the fine shall exceed twenty-five dollars, or the imprisonment exceed thirty days. The authorities of said town, with the consent of the county court, entered of record, shall have the right to use the county jail whenever it may be needed by them. Whenever judgment shall be rendered against any person for fines, and there be no visible effects which the sergeant may destrain and sell therefor, the persons so in default may be compelled to work out such fines on the public streets or other improvements, and to suffer, in addition, such term of imprisonment as may be prescribed by ordinance of said town. All fines for violation of the ordinances of said town shall be paid into the treasury of said town, and shall be appropriated as the council may determine.

13. The council may annually levy a tax for roads, streets, sidewalks and all other purposes by a two-thirds vote, to be approved by the mayor, which on no property shall exceed fifty cents on the hundred dollars' valuation, except that on a petition of freeholders representing two-thirds of the valuation within the corporation, the council may levy a corporation tax not to exceed the amount named in the petition. The poll tax shall not exceed fifty cents on each male person in any one year. The said town and the taxable persons and property therein shall be exempt and free from the payment of all county levies.

14. No license shall be granted to any person, club or corporation to sell wine, ardent spirits, malt liquors, cider, or any mixture thereof, alcoholic bitters or fruits preserved in ardent spirits, either by wholesale, retail or to be drunk at the place where sold, or in any other way, within the corporation limits of said town, or within

one mile thereof, without, unless and until the applicant shall produce to the court or officers authorized to grant such licenses the written consent of the council of said town.

15. The mayor and council, and each member of the council, shall have power and authority to deputize any number of citizens of the town, and such as may be in town from said county, to assist the sergeant in the full discharge of his duties in all cases of riot and misdemeanors.

16. W. A. Lathrop, John W. Spotts, W. O. Davies, John McDowell, Charles Bolton, or any three of these persons are hereby authorized and empowered to hold the election agreeably to the provisions of this act, for the election of a mayor and council of said town, on the fourth Thursday in May, eighteen hundred and eighty-four, at the storehouse of the Southwest Virginia Improvement Company in said town.

17. This act shall be in force from its passage.

A copy:

J. BELL BIGGER,
Clerk of House of Delegates and Keeper of the Rolls of Virginia.

March 3rd, 1897.

76 "Exhibit Collins' Receipt," referred to in the affidavit of Kimball, is in the words and figures following, to wit:

"EXHIBIT COLLINS' RECEIPT."

P. O. Box 2312.

Southwest Virginia Improvement Co.

John P. Illsley, president.

138 SOUTH THIRD STREET,
PHILADELPHIA, *July 30th*, 1883.

Received of Wm. Lamb draft for $812.35 in settlement for (12) twelve cars Pocahontas coal 466,600 lbs—208 $\frac{680}{2240}$ tons at $3.90 per ton.

$812.35.

(Signed.) SOUTHWEST VIRGINIA IMPROVEMENT CO.
E. J. COLLINS, *Treasurer.*

An affidavit of William Lamb was also filed on said 31st day of March, 1897, which affidavit is in the words and figures following, to wit:

BLEED THROUGH POOR COPY

United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

STATE OF VIRGINIA, *City of Norfolk,* } *ss:*

William Lamb, being duly sworn according to law, deposes and says that he resides at Norfolk, Virginia, and is a member of the firm of William Lamb & Co.

That since 1866 he has been engaged in the coal business. In 1883 he was appointed agent of the Southwest Virginia Improvement Company for the sale of their coal mined in Tazewell county, Virginia, which coal was put upon the market as "Pocahontas coal;" that deponent, in confirmation of this, appends copies of:

I. An original letter of the sales agent of the company, Mr. E. S. Hutchinson, dated July 5th, 1883, in which he designates the coal as "Pocahontas."

77 II. Original receipt of E. J. Collins, treasurer, for $812.35, proceeds of sales of 12 cars "Pocahontas" coal, dated July 30th, 1883.

III. Page 241, from invoice book, showing that bills were made out for "Pocahontas" coal in September, 1883.

IV. Page 243, from invoice book, showing that returns were made in September 15th, 1883, for "Pocahontas" coal.

And further this deponent saith not.

WILLIAM LAMB.

Sworn to and subscribed before me this 26th day of March, A. D. 1897.

ROB'T W. LAMB,
[SEAL.] *Notary Public.*

The Hutchinson letter, referred to in the foregoing affidavit, is in the words and figures following, to wit:

EXHIBIT HUTCHINSON LETTER.

P. O. box 2312.

Southwest Virginia Improvement Co.

Edward S. Hutchinson, sales agent.

138 SOUTH THIRD STREET, PHILADELPHIA, *July* 5, 1883.

Col. Wm. Lamb, ag't S. W. Va. Imp't Co., Norfolk, Va.

D'R SIR: I am in receipt of your favor of 2nd inst. with enclosures. We are all especially pleased with the testimonial from Mr. McCar

rick, and it confirms the view we have all along entertained that the Pocahontas coal is the best steam coal in the market.

First with regard to the No. 2 coal. We will fill any orders you may have taken at that price, $2.50, but on receipt of this please withdraw our offer from the market, as we have made a better disposition of it elsewhere.

The offer to furnish coal to Clyde line for the "Ariel" at $3.90 was to have cars on their siding, as that is the way they wanted it. I cannot understand Mr. McCarrick's remark "that O. D. S. S. Co. had secured the only accessible place at company's coal pier." I have a similar letter from Geo. W. Taylor & Co., saying they
78 can get no bins for storage of coal. I know the accommodations are limited, but have supposed that more than one company could get bins. We cannot undertake, of course, the delivery of such small lots as 12 tons 3 times per week, as Mr. McCarrick suggests, unless it is by car-load as first proposed. The question of barges has been favorably considered, and we want to have one or two by the time we get a regular supply of coal down. I noticed there were several in use around Norfolk, and I presume they *cd.* be purchased as cheaply in that city or in Portsmouth as anywhere else, beside the saving *or* towing. What *cd.* you get a couple of the capacity you mention—200 tons, built for, and how soon? If you can send me a rough diagram giving length, breadth, depth, thickness of gunwale and of bottom planking, and also the manner you think best for dividing it into compartments, I will solicit bids for comparison with yours.

I presume those parties who wished sidings have made application to the proper authorities. I refer to Batchelder & Collins & Lantos Bros.

Yours truly, E. S. HUTCHINSON, *Sales Ag't.*

The Collins receipt referred to in the said Lamb affidavit is in the words and figures following, to wit:

EXHIBIT COLLINS RECEIPT.

Southwest Virginia Improvement Co.

John P. Ilsley, president.

138 SOUTH THIRD STREET,
PHILADELPHIA, *July 30th*, 1883.

Received of Wm. Lamb, draft for $812.35 in settlement for (12) twelve cars Pocahontas coal, 466,600, $208\frac{680}{2240}$ tons, at $3.90 per ton.

SOUTHWEST VIRGINIA IMPROVEMENT CO.
E. J. COLLINS, *Treasurer.*

$812.35.

The exhibits referred to in the said Lamb affidavit as invoice book, pages 241 and 243, are in the words and figures following, to wit:

BLEED. THROUGH POOR COPY

79 EXHIBIT "INVOICE BOOK, PAGES 241, 243, LAMB, AGENT."

NORFOLK, *September 5th*, 1883.

Old Dominion Steamship Co. to Southwest Va. Improvement Co., Dr.

To 10 cars of Pocahontas coal at $3.75 per 2,240 lbs.

1.	Car No.	6,054,	weight	38,100 lbs.
2.	"	6,066,	"	37,000 "
3.	"	6,428,	"	35,200 "
4.	"	6,328,	"	36,000 "
5.	"	4,053,	"	38,600 "
6.	"	6,292,	"	37,000 "
7	"	6,011,	"	37,300 "
8.	"	6,113,	"	37,500 "
9.	"	6,102,	"	36,100 "
10.	"	4,156,	"	39,000 "

Total weight 371,800, at $3.75 per 2,240—$622.43.

NORFOLK, VA., *Sept. 6th*, 1883.

Capt. Edward Pickup to Southwest Va. Improvement Co., Dr.

To 6 cars of Pocahontas coal at $3.75 per 2,240 lbs.

1.	Car No.	6,300,	weight	36,300 lbs.
2.	"	4,128,	"	42,100 "
3.	"	6,393,	"	35,400 "
4.	"	6,010,	"	36,300 "
5.	"	4,118,	"	40,100 "
6.	"	6,056,	"	37,300 "

Total weight, 227,500, at $3.75 per 2,240 lbs.—$380.86.

Report of Sales of 14 *Car-loads of Pocahontas Coal, August*, 1883.

Car No.	1,616,	weight	37,100 lbs.
"	6,337,	"	35,700 "
"	6,270,	"	36,500 "
"	4,156,	"	36,200 "
"	6,448,	"	36,100 "
"	6,461,	"	34,800 "
"	6,216,	"	36,600 "
"	6,181,	"	36,800 "
"	6,458,	"	37,100 "
"	6,089,	"	35,900 "
"	6,074,	"	37,200 "
"	6,315,	"	36,100 "
"	6,013,	"	37,200 "
"	4,107,	"	39,100 "

80 Total weight 512,400 lbs., at $3.75 per 2,240 lbs.—$857.80.

E. & O. ex.
Norfolk, Va., Sept. 15th.

WM. LAMB, *Ag't.*
S. W. V. IMP. CO.,
Per C. LAMB.

The foregoing affidavits are endorsed as follows:

United States circuit court, district of West Virginia. In equity. Samuel Castner, Jr., and Henry B. Curran, copartners, trading under the firm name and style of Castner & Curran, complainants, *vs.* W. H. Coffman, doing business under the name and style of the Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, defendant. Complainants' affidavits on motion for preliminary injunction. J. Walter Douglass, Henry E. Everding, solicitors for complainants, 914 Walnut street, Philadelphia, Pa. Circuit court U. S., dist. W. Va. Filed in office this 31st day of March, 1897. L. B. Dellicker, clerk.

Process was duly issued as prayed for in the bill, which process is in the words and figures following, to wit:

UNITED STATES OF AMERICA, } *ss*:
District of West Virginia, }

The President of the United States of America to the marshal of the district of West Virginia, Greeting:

You are commanded to summon W. H. Coffman, doing business under the name and style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, a citizen of and resident in the State of West Virginia, if they be found in your district, to be and appear in the circuit court of the United States for the district of West Virginia aforesaid, at rules to be held in the clerk's
81 office of said court at Charleston, on the first Monday in May next, to answer a certain bill in chancery now filed and exhibited in said court against him by Samuel Castner, Jr., and Henry B. Curran, copartners trading under the firm name and style of Castner & Curran, citizens of and residents in the State of Pennsylvania. Hereof you are not to fail under the penalty of the law thence ensuing, and have then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 5th day of April, A. D. 1897, and in the [L. S.] 131st year of the Independence of the United States of America.

Attest: L. B. DELLICKER, *Clerk.*

MEMORANDUM.—The said defendant is required to enter his appearance in this suit in the clerk's office of said court on or before the first Monday of May, 1897, otherwise the said bill may be taken *pro confesso.*

L. B. DELLICKER, *Clerk.*

(Endorsed:) United States circuit court, district of West Virginia. No. —. Castner & Curran *vs.* W. H. Coffman, doing business, &c. Subpœna in chancery. Returnable first Monday of May, 1897 Douglass & Everding, compl'ts' solicitor-.

The return endorsed upon the said process is in the words and figures following, to wit:

BLEED. THROUGH POOR COPY

Executed April 8th, 1897, by serving a copy of within writ on W. H. Coffman. C. E. Wells, U. S. marshal, per J. D. Harrison, deputy. Marshal's fees for serving spa. and restraining order, $4.00.

82 The restraining order in said cause above set forth was duly served, as appears from a copy of said order with the endorsement on said copy, which copy and endorsement is in the words and figures following, to wit:

At a circuit court of the United States for the district of West Virginia, held at Charleston, March 31st, 1897.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Co-partners, Trading under the Firm Name and Style of Castner & Curran, Complainants,
vs.
W. H. COFFMAN, Doing Business under the Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant. } At Chambers.

On reading the bill of complaint filed in the above-entitled cause, on the 12th day of March, 1897, and on reading and filing the affidavits of Samuel Castner, Jr., Henry B. Curran, David H. Matson, George A. Shirey, Albert S. Hurst, Thomas L. Wilcox, L. D. Calfee, Nicholas A. Sayers, F. E. Dillie, John M. Stockman, Charles E. Wales, Fred W. Barney, Horace N. Claxton, George E. Alkins, Henry R. Mather and Arthur V. Briesen, and the exhibits accompanying said affidavits.

Now on motion of Henry E. Everding, solicitor and of counsel for the complainants and due consideration had, it is ordered that the defendant, W. H. Coffman, show cause before me at Charleston, West Virginia, on the 4th day of May, 1897, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an injunction should not issue against the said defendant as prayed for in said bill of complaint, and it is further ordered that the said defendant, W. H. Coffman, be restrained from the date of service of this order until the further order of this court from selling, advertising or offering for sale any coal as "Pocahontas" coal, or from continuing the acts complained of in and by said bill of complaint, and it is further ordered that a copy of this order be served upon the defendant personally, on or before the 10th day of April, 1897.

It is further ordered that before the restraining order above set forth shall be operative, the complainants shall file with the clerk of this court a bond in the penal sum of one thousand dollars ($1,000), which bond is to be approved by the clerk.

JACKSON, *Judge.*

March 31, '97.

83 I, L. B. Dellicker, clerk of the circuit court of the United States, for the district of West Virginia, hereby certify that the foregoing is a true copy of an order entered of record in said court at Charleston, at chambers, on the 31st day of March, 1897,

in the equity cause of Castner & Curran *v.* W. H. Coffman, &c., therein pending.

[L. S.] Given under my hand and seal of said court, at Parkersburg, in said district, this 5th day of April, 1897.

L. B. DELLICKER,
Clerk C. C. U. S., D. W. Va.

Bond given as required in the foregoing order.

Attest:

L. B. DELLICKER,
Clerk C. C. U. S., D. W. Va.

(Endorsed:) No. —. Circuit court United States for the district of West Virginia, Charleston. Castner & Curran *vs.* W. H. Coffman, &c. In equity. Restraining order. Serve on W. H. Coffman. The return endorsed upon said process is in the words and figures following, to wit: Executed April 8th, 1897, by serving a copy of the within writ or process on W. H. Coffman. C. E. Wells, U. S. marshal, by J. D. Harrison, deputy.

And on another day, to wit:

In the circuit court of the United States for the district of West Virginia, at chambers, on the 12th day of April, A. D. 1897, an order was made and entered of record; which order is in the words and figures following, to wit:

SAMUEL CASTNER and H. B. CURRAN, Partners, &c.,
vs.
W. H. COFFMAN. } In Equity.

84 This day the defendant, W. H. Coffman, presented his petition duly verified by affidavit, suggesting to the court that the restraining order heretofore granted in this cause should be dissolved.

And it appearing to the court that there is no averment in the bill which alleges or sets up a trade-mark to which the plaintiff is entitled to the exclusive use of the word "Pocahontas" as applicable to Pocahontas coal in the Pocahontas region, the court is of the opinion that the injunction heretofore awarded was improvidently granted, and for this reason is of opinion to suspend the operation of this injunction until the fourth day of May next, and until the further order of the court, upon the defendant giving bond in the penalty of one thousand dollars, to perform any decree which may be made by the court, which said bond shall be approved by the clerk of this court.

(Endorsed:) April 12, '97. Enter. Jackson, judge.

The petition referred to in the foregoing order is in the words and figures, to wit:

BLEED. THROUGH POOR COPY

In the Circuit Court of the United States for the District of West Virginia.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Partners, &c., *vs.* W. H. COFFMAN. } In Equity.

To the honorable judges of the circuit court of the United States for the district aforesaid:

The petition of the said W. H. Coffman respectfully shows:

1. That on the 31st day of March, 1897, while your honors' court was not in session at Charleston, and while the Honorable Nathan Goff, judge of said circuit court, and the Honorable John J. Jackson, judge of the United States court, were holding a term of court at Parkersburg in said district, an order was made in above cause, without notice or warning of any kind to your petitioner, restraining your petitioner from selling, advertising or offering for sale any coal as "Pocahontas," and from continuing the acts complained of in the bill.

2. The said restraining order was served on petitioner about six o'clock p. m. on April 8th, 1897, and petitioner at once ad-
85 vised with counsel, and learned that the order fixes a hearing on plaintiff's motion for an injunction at Charleston on May 4th, and that none of the plaintiffs or of their counsel could be found in West Virginia, on whom a notice of any motion for relief from the hardships of said order could be served.

3. Your petitioner lives at Bluefield, where he is well known, and could not know the contents of said bill until he saw a copy thereof at Parkersburg, on April 10th, and he is not prepared to make formal answer to said bill, and has no counsel familiar with practice in trade-mark cases or with the coal business, and has not access to the men or material by whom to present a full defense to said bill; but he is able to show at this time, as virtually appears from the bill, that the plaintiffs are mere commission agents for the sale of coal, and they pretend that none of the coal produced in the town of Pocahontas, or in that region and section of the two Virginias known as the Pocahontas fields, can be sold by any one, except the complainants, as Pocahontas coal. The complainants do not produce or mine any coal; nor is it a fact that they own or are entitled to the appropriation of the name Pocahontas to cover coal produced or marketed from that section.

4. In the year 1885 the complainants undertook to acquire a trade-mark in their own name under the laws of the United States, and on or about the 29 day of September, 1885, as a corporation, one of their firm caused to be registered a pretended trade-mark, which was alleged to consist of the name "Pocahontas." For several years prior to that time the coal region about the town of Pocahontas was known as the Pocohontas coal section, and for more than 20 years a vast area in that section had been known as the Flat Top region—a term taken from the geological formations there

prevailing; but the plaintiffs unfairly conceal from the court the fact of having attempted to acquire the exclusive use of the name "Pocahontas" by a pretended compliance with the law relating to trade-marks for several reasons:

(1.) Such registered trade-mark is void on its face in seeking to appropriate a word of common use designating a locality, section and region of country.

Columbia Mill Co. v. Alcorn, 150 U. S., 461.

(2.) Complainants claim that the word indicates the grade and quality of coal without reference to the ownership of the coal. (*Ib.*)

86 (3.) That designation had been used by other dealers of coal, and the public generally understood it to be descriptive of the section of the country where the coal came from.

(4.) The bill itself shows that persons other than plaintiffs had for years before 1885 been dealing in coal described as Pocahontas coal, and mine-owners who owned and operated mines so described it.

5. Your petitioner further shows that neither under the laws of the United States, nor in any other manner, have the complainants acquired the right to exclude any person from selling coal as Pocahontas coal.

6. Your petitioner is handling coal mined and produced from what are known as the Browning mines, in the city of Pocahontas, which is a town of about 4,000 people, and he also sells coal from the Indian Ridge Coal & Coke Company's mines, which are about 6 miles from said town, and in the Pocahontas district.

So notorious is the relation of the designation Pocahontas to that section of country that the Norfolk & Western railroad and the public generally so refer to it, and, for illustration, a public circular of said railroad is herewith filed as "Exhibit A."

7. Your petitioner is selling coal under contracts made with the Browning mines and Indian Ridge mines—the product of the latter of which was at one time sold through complainants as their bill alleges; and your petitioner has also made contracts with buyers of coal under which he has contracted at stipulated prices to furnish coal. It is true that under the belief and under the advice that he had the right to describe this coal as Pocahontas coal, he so described it in several, if not all, of his contracts; and a failure to comply with these contracts will not only be a grievous and irreparable hardship on your petitioner, but will seriously affect the persons with whom he has contracted.

8. Your petitioner is under contract to ship to customers and take from the mines at least 16 car-loads per day; and this work must go on or cause ruin to your petitioner; and your petitioner will be seriously embarrassed in prospective business if prevented from shipping and delivering coal in pushing his trade and acquiring new customers.

9. The coal handled and sold by your petitioner is of ex-

87 cellent quality, is favorably received and used by the trade and public, and is better by actual analysis than the average

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of the coal handled by plaintiffs. Petitioner has perpetrated no fraud or deceit upon the public or upon the plaintiffs. It is the absolute truth, that the petitioner has sold, and is selling as Pocahontas coal, from the Indian Ridge mine, which plaintiffs once handled under that designation, and petitioner also sells coal mined in the town of Pocahontas from the Browning mines, the output of which plaintiffs once handled, but all this is done under contract with owners of the mines, and it is not pretended that plaintiffs have any right to trade or market any of the product of any of these mines.

10. Your petitioner fears that, in any way he may attempt to do a lawful business and to comply with his honest contracts, he will be harrassed and embarrassed by proceedings for an alleged disrespect of the orders of this court. He will be ready in due and formal proceedings, by the time set for hearing, to show and satisfy your honors that the plaintiffs are not entitled to any injunction against him.

He respectfully submits that the restraining order was improvidently awarded, and will be used to do him irreparable damage, and he earnestly submits and prays that he be relieved from a ruinous injunction, and that he be not condemded unheard, and that the court will give him an opportunity to present his case and to have a hearing before any restrictive process is allowed to destroy him and his business, on which his living depends.

Your petitioner prays that the said restraining order be set aside, and that he be allowed to file this petition (hastily prepared) without prejudice to his full right to make his necessary defence, by answer or otherwise, and that the court will grant such other relief in the premises, as in equity may be just, &c.

W. H. COFFMAN,
By Counsel.

B. M. AMBLER,
Parkersburg, W. Va., Counsel for Petitioner.

STATE OF WEST VIRGINIA, } *To wit:*
County of Wood, }

W. H. Coffman, being duly sworn, upon his oath says, that he has read the foregoing petition subscribed by his counsel in his name; and that the allegations thereof so far as stated on his own
88 knowledge are true, and so far as stated upon advice or information, he believes the same to be true.

W. H. COFFMAN.

Sworn and subscribed before me, this 10th day of April, A. D. 1897.

W. W. VAN WINKLE,
[SEAL.] *Notary Public.*

(Endorsed:) Castner & Curran *vs.* W. H. Coffman. Petition of Coffman. Filed in office this 12 day of April, 1897. L. B. Dellicker, clerk. B. M. Ambler, *p. q.*

The trade-mark referred to in the foregoing petition is in the words and figures following, to wit:

UNITED STATES PATENT OFFICE.

Castner & Company (Limited), of Philadelphia, Pennsylvania.

Trade-mark for Bituminous and Semi-bituminous Coal.

Statement and declaration of trade-mark No. 12602 registered September 29, 1885.

Application filed August 25, 1885.

Statement.

To all whom it may concern:

Be it known that Castner & Company (Limited), a corporation organized under the laws of the State of Pennsylvania, and located and doing business in the city of Philadelphia, in said State, has adopted for its use a trade-mark for coal, of which the following is a full, clear and exact specification:

The said trade-mark consists of the word symbol "Pocahontas." This has generally been arranged as shown in the accompanying fac-simile, and has been used in connection with a vignette or picture of a female Indian or squaw, commonly considered a representation of the celebrated Indian of that name, and also with the words "Flat Top coal." As shown, the Indian is represented
89 as sitting on a rock, having a quiver of arrows strapped over her back and supporting with her hands at one side a medallion, near the edge of which are arranged the words "Pocahontas Flat Top coal." The words "Flat Top" and "coal" may be omitted or changed, however, as may also the other features of the picture, without materially altering the character of the trade-mark, the essential feature of which is the word "Pocahontas."

This trade-mark has been used continuously by said corporation since about January 1, 1885.

The class of merchandise to which the trade-mark is appropriated is coal, and the particular description of article embraced in said class in connection with which it is used by said company is bituminous or semi-bituminous coal.

It has been the practice to apply the trade-mark to bill and letter-heads, advertisements, &c., used in the ordinary transaction of business connected with said coal, but any other manner of using and applying it may be adopted.

In testimony whereof, I, Sam'l Castner, Jr., chairman of said company of Castner & Co. (Limited), affix the name of said company in the presence of two witnesses.

CASTNER & CO. (LIMITED),
By S. CASTNER, JR., *Chairman.*

Witnesses:
I. C. CEMAN.
JNO. G. McKARAHER.

Declaration.

CITY AND COUNTY OF PHILADELPHIA, *State of Pennsylvania,* } ss:

Sam'l Castner, Jr., being duly sworn, deposes and says that he is the chairman of the corporation, the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that said corporation at this time has a right to the use of the trade-mark therein described; that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that it is used in commerce with foreign nations, and particularly with England, Great Britain generally, and Spain, Denmark and France and Germany; that the description and fac-similes presented for record truly represent the trade-mark sought to be registered, and that he is a citizen of the United States.

S. CASTNER, JR.

90 Sworn to and subscribed before me this 21st day of August, 1885.

GEORGE BLAESE,
[L. S.] *Notary Public.*

(A vignette is pinned to this exhibit showing the trade-mark as described in the statement.)

(Endorsed:) Circuit court U. S., dist. W. Va. Filed in open court this 5 day of May, 1897. L. B. Dellicker, clerk.

Exhibit "A" referred to in the foregoing petition of Coffman is in the words and figures following, to wit:

I. C. C. No. 322 B.

Superseding tariff I. C. C. No. 170 B.

To be posted in two conspicuous places at each freight shipping station.

Norfolk & Western joint freight tariff C. & C. No. 1039, superseding tariff C. & C. No. 859 of Oct. 13, 1896.

Joint south-bound freight tariff on coke in car-load quantities of 24,000 lbs.—minimum per ton, 2,000 pounds—between the Norfolk & *and* Western railway, Cape Fear & Yadkin Valley railway, from Pocahontas district, viz, Pocahontas, Va.; Elkhorn, Bramwell, Goodwill, Powhatan, Kyle, Keystone, Landgraff, and Vivian, W. Va., to Greensboro, N. C., account of Greensboro Furnace
91 Co.; from points east of Flat Top tunnel, $1.25; from points west of Flat Top tunnel, $1.35; issued April 3, 1897; in effect April 15, 1897; route, N. & W. R'y to Walnut Cove, N. C.; C. F. & Y. V. R'y to destination.

Under this tariff, when freight is to be loaded by consign- or unloaded by consignee, one dollar ($1.00) per car per day, or fraction

thereof, for delay beyond 48 hours in loading or unloading, will be added to the rates named herein, and constitute a part of the total charges to be collected by the carrier on the property; except, however, when in conflict with Car Service Association, or local regulations at shipping point or destination, in which case such Car Service Association or local regulation shall prevail.

T. D. HOBART,
Coal and Coke Freight Agent, N. & W. R'y, Roanoke, Va.
T. S. DAVANT,
General Freight Agent, N. & W. R'y, Roanoke, Va.

The following officer of the above-named road will certify to the Interstate Commerce Commission his concurrence in the rates given herein:

W. E. KYLE,
G. F. A., C. F. & Y. V. R'y, Fayetteville, N. C.

(Endorsed:) Exhibit A. Filed in office this 12th day of April, 1897. L. B. Dellicker, clerk.

Bond as required of the defendant under the foregoing order of April 12th was duly given, which bond is in the words and figures following, to wit:

Know all men by these presents that we, W. H. Coffman and Indian Ridge Coal and Coke Company, a corporation, are held and firmly bound unto the United States of America, in the penal sum of one thousand dollars, to the payment whereof, well and
92 truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of April, 1897.

The condition of the above obligation is such, that, whereas the above-bound W. H. Coffman has obtained from the judge of the circuit court of the United States for the district of West Virginia, an order suspending the operation until May 4th, 1897, and until the further order of the court, of a restraining order or injunction heretofore awarded in the certain cause pending in said court, wherein Samuel Castner, Jr., and H. B. Curran, copartners as Castner & Curran, are complainants, and the said W. H. Coffman is defendant, which order of suspension requires the execution of this bond.

Now, if the above-bounden W. H. Coffman shall well and truly perform any decree which may be made by the court in the cause, then this obligation to be void, otherwise to remain in full force and virtue.

W. H. COFFMAN. [SEAL.]
INDIAN RIDGE COAL & COKE CO.,
By WORTH KILPATRICK, *Pres't.* [SEAL.]

The foregoing bond is approved this 12th day of April, 1897.

L. B. DELLICKER,
Clerk C. C. U. S., D. W. Va.

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(Endorsed:) No. —. Circuit court United States for the district of West Virginia. Castner & Curran *vs.* W. H. Coffman. In equity. Bond of defendant. Circuit court U. S., dist. W. Va. Filed in office this 12th day of April, 1897. L. B. Dellicker, clerk.

The said bond was executed by Worth Kilpatrick, president, for the Indian Ridge Coal and Coke Company, in pursuance of a resolution of the boord of directors of said company, which resolution is in the words and figures following, to wit:

93 CONNELLSVILLE, PA., *Ap'l* 12, 1897.

At a meeting of the board of directors of the Indian Ridge Coal & Coke Co., held Ap'l 12th, 1897, the following resolution was adopted, viz:

Resolved, That Worth Kilpatrick, president of the Indian Ridge Coal & Coke Co., be and is hereby authorized to execute a bond in the name of said company for such amount as may be required in the case of Castner & Curran *vs.* W. H. Coffman, now pending at Parkersburg, W. Va.

[L. S.] WORTH KILPATRICK, *Pres't.*

Attest: J. A. ARMSTRONG, *Secretary.*

(Endorsed:) Castner & Curran *vs.* W. H. Coffman. In equity. Authority to execute bond. Circuit court U. S., dist. W. Va. Filed in office this 12th day of April, 1897. L. B. Dellicker, clerk.

And on another day, to wit:

At a circuit court of the United States for the district of West Virginia, continued and held at Charleston, in said district, on Tuesday, the 4th day of May, A. D. 1897, an order was made and entered of record, which order is in the words and figures following, to wit:

CASTNER & CURRAN
v.
W. H. COFFMAN. } In Equity.

The defendant this day filed his demurrer to the plaintiffs' bill, and on his motion the said demurrer is set down for argument.

The demurrer mentioned in the foregoing order is in the words and figures following, to wit:

94 In the Circuit Court of the United States for the District of West Virginia.

SAMUEL CASTNER, JR., and H. B. CURRAN, Partners as Castner & Curran,
vs.
W. H COFFMAN. } In Equity.

The Demurrer of the Above-named W. H. Coffman to the Bill of Complaint of the Above-named Plaintiffs.

This defendant, by protestation not confessing or acknowledging all or any of the matters or things in said bill contained to be true

in such manner and form as the same are therein alleged, doth demur to said bill, and for cause of demurrer showeth:

1st. That it appears by the plaintiff's own showing that there is no equity in said bill, that the same is not sufficient in law, and that the plaintiffs are not entitled to any relief, and especially are they not entitled to the relief prayed by the bill against this defendant.

2nd. It appears by the said bill that there are divers other persons who are necessary parties to said bill, but who are not made parties thereto. It is charged that defendant is a mere agent for the sale of the coal of the owner or owners of the Indian Ridge mine, and that such owners are necessary parties to said bill; but no such owner is made party.

3rd. The alleged trade-mark of the complainants consists of the word "Pocahontas," which designates a locality, section and region of country, and is an historic word or name in common use, which the complainants and, no one under whom they claim, did or could appropriate.

4th. That the bill shows that the defendant is selling as Pocahontas coal, a natural product of the region known as the Pocahontas region or section of the two Virginias.

5th. That the plaintiff alleges in paragraph 12 of their bill that the defendant has pretended that the coal he is selling is the same sold by the complainants *or* is of the *quality* of that sold by them, but does not charge that he is palming off his commodity as being the commodity of the complainants, nor do they charge that he represents or induces any person to believe that he is selling or offering the goods or property handled by complainants. The defendant is not liable in equity for representing that his coal is of good quality as that of complainants.

95 6th. The complainants are mere agents for sale of coal, owning none and producing none, but handling a mere natural product of the earth. The coal as it lies in place is in the Pocahontas coal region, and after it is mined, and before it is inspected, it is Pocahontas coal, and its name is not affected by any handling or manipulation of complainants.

7th. The claim of complainants is of an odious monopoly of a natural product, and the relief asked is to prevent the Indian Ridge Mine owners from selling through their agent coal produced in the Pocahontas region as Pocahontas coal, and a court of equity will not enjoin a defendant from telling the truth, or compel him to suppress the truth as to the local origin of a product.

8th. The bill alleges that the Southwest Improvement Company named its mine Pocahontas and allowed complainants to sell coal generally from that region under that name; and that said company in 1895 transferred to complainants, for nominal consideration, the use of that name, after it had been for 12 years — to designate coals other than such as were produced from said mine, and, thus, if any such trade name ever existed it was lost or abandoned, and complainants are estopped to set up or claim the same.

9th. The complainants do not deny that the coal handled and

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sold by defendant is produced in the Pocahontas region; and are not entitled to enjoin him from indicating and stating its local origin.

10th. The bill shows that plaintiff- seek to present the owners of Pocahontas coal from selling it as such, and to lay that vast and teeming territory under tribute to them. Wherefore for divers other good causes of demurrer appearing in said bill, this defendant doth demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any answer to said bill, and he humbly prays to be hence dismissed with his costs.

W. H. COFFMAN,
By B. M. AMBLER,
Parkersburg, W. Va., of Counsel.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

B. M. AMBLER,
Of Counsel for Coffman.

96 In the Circuit Court of the United States for the District of West Virginia.

W. H. Coffman, being duly sworn, deposes and says: I am the above-named defendant, and the foregoing demurrer is not interposed for delay.

W. H. COFFMAN.

Sworn and subscribed before me this 4th day of May, 1897.
L. B. DELLICKER, *Clerk.*

(Endorsed:) Castner & Curran *v.* Coffman. Demurrer. B. M. Ambler, of counsel. Circuit court U. S., dist. W. Va. Filed in open court this 5 day of May, 1897. L. B. Dellicker, clerk.

And on another day, to wit:

At a circuit court of the United States for the district of West Virginia, continued and held at Charleston, in said district, on Wednesday, the fifth day of May, A. D. 1897, an order was made and entered of record, which order is in the words and figures following, to wit:

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Co-partners, Trading under the Firm Name of and Style of Castner & Curran, Complainants,	
vs.	In Equity.
W. H. COFFMAN, Doing Business under the Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.	

This day came the complainants, by their counsel, Arthur V. Briesen and Henry E. Everding, Esqrs., and the defendant, by his counsel, B. Mason Ambler and S. C. Graham, Esqrs., and thereupon the said defendant filed his demurrer to the bill of complaint, which

was set down for argument forthwith, and said demurrer, being argued by counsel and considered by the court is overruled.

97 And thereupon this cause came on to be heard upon the complainants' motion for an injunction in accordance with the order heretofore entered in this cause on the 31st day of March, 1897, and thereupon the said defendant filed his sworn answer to the bill and the following affidavits, to wit: Justus Collins, I. A. Welch, C. Bottsford, Worth Kilpatrick, W. S. Cope and A. R. Paddock. And thereupon the complainants replied generally to said answer and filed the affidavits of F. J. Kimball and I. A. Welch in rebuttal. And thereupon the said motion for an injunction being argued by counsel upon the bill of complaint and affidavits filed therewith, the sworn answer of the defendant and replication thereto and the affidavits aforesaid, and considered by the court, it is adjudged, ordered and decreed as follows: That the defendant in his own name, and in the name of the Pocahontas Coke and Coal Company, and in the name of the W. H. Coffman Coke Company, and his servants, attorneys, associates, confederates, agents and workmen, and each and every of them be and the same are restrained and inhibited from using the name "Pocahontas" or "Pocahontas Flat Top" in connection with his business, the court being of the opinion that the complainants have a right to use the said word "Pocahontas" for the purpose of indicating that the coal was from the Pocahontas field, and that the complainants have the sole right to use said word as indicating the character of coal they sell. But this injunction is not to restrain or inhibit the defendant or his agents from advertising, offering for sale or selling coal from what is known in Virginia, or West Virginia, as the Pocahontas coal-field, or advertising the coal so mined and produced from that field, and this injunction shall not apply to transactions of the defendant already concluded by actual shipments of coal.

The answer referred to in the foregoing order is in the words and figures following, to wit:

To the honorable judges of the circuit court of the United States for the district of West Virginia:

I. The answer of W. H. Coffman, who is made a party defendant as doing business under the name and style of the Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, to a bill in chancery exhibited in said court against him by Samuel Castner, Jr., and Henry B. Curran, copartners, trading under the firm name and style of Castner & Curran, respectfully states that, if the demurrer which he has filed to the bill in said cause be over-

98 ruled and your respondent required to answer, then he answers and says: That he finds the bill so prolix and obscure that it is difficult for him to clearly and accurately understand the exact grounds of complaint against him, and to which he must respond.

From the best analysis he is able to give this bill, he understands that he is charged with:

1st. Knowingly and fraudulently pirating an alleged trade-mark

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of the complainants, which trade mark they claim to be the word or name "Pocahontas;" that complainants trace their claim and title to this alleged trade-mark in their bill as follows: That about the year 1882, a tract, or field, of smokeless or semi-bituminous coal was opened and mined in Tazewell county, Virginia; that this coal was mined in the year 1882, and up to January, 1884, by a corporation in Tazewell county, Virginia, by the name of the Southwest Virginia Improvement Company; that this corporation sold its coal as "Pocahontas" coal, having adopted the trade-mark "Pocahontas" as designating its output; that about the year 1884, a firm by the name of Castner & Co. was formed in the State of Pennsylvania and purchased the coal so mined by the Southwest Virginia Improvement Company, and shipped and sold said coal as "Pocahontas" coal, principally at tidewater points; that in the year 1889, the present complainant succeeded Castner & Co., and that they have continued to ship said coal as "Pocahontas" coal and as "Pocahontas Flat Top" coal; that about April 1st, 1895, the complainants, for the sum of $5.00, purchased from the Southwest Virginia Improvement Company "the trade name, or mark, 'Pocahontas.'" From all this it appears that the single word "Pocahontas" is the trade name, or mark, claimed by complainants. The prayer of the bill, in reference directly to this trade-mark is that your respondent be perpetually enjoined "from selling, or causing to be sold, shipping or billing, or causing to be shipped and billed, or offering for sale, or advertising for sale, or in any manner disposing of any coal designated 'Pocahontas,' 'Pocahontas Flat Top,' or any abbreviations of Pocahontas, and from in any manner imitating or simulating said mark 'Pocahontas,' or of using the name 'Pocahontas' in any manner whatsoever in connection with the coal business." It will be observed that complainants do not contend, or pretend, that this trade-mark is registered under the laws of the United States, or of any State.

2nd. Your respondent is charged in sec. XII with deceiving
99 the public and dealers in coal by offering for sale and selling a very impure coal under the name and designation of "Pocahontas;" that by letters, notes and bills, whereon the word symbol "Pocahontas" is prominently displayed in a conspicuous manner, that purchasers of this so-called inferior coal would be liable to purchase it as the coal of your orators, which is superior, they allege, to respondent's coal.

II. Right in the outset of his defense, your respondent wishes to state emphatically that he has at no time, and at no place, attempted to induce the public or any single individual to believe that he was acting with, or under or connected with the complainants or their business, or simulated them in any way, but, upon the contrary, he has boldly, openly and with all the energy at his command, entered the markets of the commercial world in open competition with complainants, as appears by their own showing. He has not attempted in any way, manner, shape or form, to take any unfair advantage of complainants or of their trade. By combinations, which will be more particularly spoken of hereafter, the complainants from time

to time have become the enforced agents, until recently, of all the coal produced by the thirty-eight several coll-eries operating in the great Pocahontas Flat Top coal-field, and have thus been able to dictate not only what price the producers should receive for coal at their hands, but what price the consumer should pay them.

Your respondent is now placing upon the market the very same coal from two of these coll-eries, and openly and truthfully showing himself an independent sales-man and agent, carrying on a legitimate competition with similar agents, using the legitimate mode of advertisement; and this he believes is the true and only cause of complaint against him by complainants.

III. The complainants claim that for the sum of $5.00 they purchased the trade-mark, word symbol "Pocahontas" from the Southwest Virginia Improvement Company by writing bearing date the 1st of April, 1895, and that under this purchase they have the exclusive right not only to sell the output of coal from the mines of the Southwest Virginia Improvement Company, but of all the other thirty-eight mines now operating in the vast Pocahontas Flat Top coal measures. Your respondent is advised that the complainants cannot claim protection for the exclusive use of the trade-mark or trade name, which would practically give them a monopoly in a great geographical section and in the sale of coal other than that handled by them; that if they could, the public would be injured rather than protected, for competition would thereby be destroyed; that such trade-mark cannot consist of words in common use, as designating locality, section or region of country. Your respondent represents that for many years, anyhow as far back as the years 1883 and 1884, the name "Pocahontas" became the appellation for a vast coal-field lying in the county of Tazewell, Virginia, and in the counties of Mercer and McDowell, West Virginia. This name "Pocahontas," as applied to that immediate coal-field, may have received its initial origin from the town of Pocahontas, near which the mines of the Southwest Virginia Improvement Company are located, being the first mines to begin to ship coal from that region in the year 1883, but the vast territory of coal, all of the very same kind, and in reality of one great seam, was known to exist as early as the year 1873, and at once, after the year 1883, from association, the vast fields received the name of the Pocahontas field, often called the Pocahontas Flat Top coal-field. As early as the year 1884 one Andrew S. McCreath, an expert mining engineer and mineralogist, made a report to F. J. Kimball, Esqr., president of the Norfolk & Western and Shenandoah Valley Railroad Company. This report was made July 1st, 1884, and the preface thereto was written by Frederick J. Kimball, and the report was published and given from the press to the world in the year 1884, and your respondent understands that it had a large circulation in this country and elsewhere. In this report an extensive description is given of this "Pocahontas Flat Top coal-fields." This geologist there treats specially of the Nelson or Pocahontas coal bed, which practically, in one shape or another, spreads over the whole field, and its greatest thickness, of about 13 feet, seems to have been about

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the outcrop at Pocahontas. This same geologist, McCreath, gives an extensive description of the fuel and cooking qualities of the Pocahontas coal.

Such of this report as refers to the subject-matter of litigation herein is made a part of this answer. In the year 1887 this same Andrew S. McCreath, in conjunction with another mineral expert, one E. V. d'Invilliers, issued from the press a book of 171 pages, entitled "The New River Cripple Creek Mineral Region." The preface to this edition was also written by F. J. Kimball, then president of the Norfolk & Western railroad, who, among other things, states in the preface as follows:

"As no report of this section would be complete without reference being made to the character and quality of the coal and coke from the Pocahontas Flat Top coal-field, there have been included
101 in this report a general review of the field, together with a brief statement regarding its development."

In this last work — McCreath and d'Invilliers, from page 150 to 154, inclusive, frequent mention is made of this Pocahontas coal-field, often using the word alone, "Pocahontas" coal. On page 150 the following appears: "As is well known, the coal in this Pocahontas Flat Top coal-field occupies a very large area in Tazewell county, Virginia, and in Mercer, Wyoming, McDowell, and Raleigh counties, West Virginia. Throughout a large portion of the Flat Top mountain area the beds are above water level and lie most conveniently for cheap development and mining. A considerable portion of this field has already secured outlet to market through the New River division of the Norfolk & Western railroad and the numerous laterals extending along the Bluestone and its branches, while a near completion of the tunnel at the head of Coal creek, on the waters of Elkhorn, will open up an additional territory on the north side in McDowell county."

Since the publication of this volume that tunnel has been completed, and the Norfolk & Western railroad has extended its line to Kenova, there making connection with all parts of the North and West.

Your respondent believes that he can safely state that no coal in America has received a wider advertisement than the product of this great coal-field, and that it is universally designated by the name "Pocahontas." It is a well-known matter of history that many of the great steamships, in civil as well as in naval service, had a trial of speed, using the coal produced in different portions of the country, and that it was proclaimed all over the world that the ships using the Pocahontas coal attained the greatest rate of speed. In the past fourteen years thirty-eight different coll-eries have been located, and are now doing work in the said coal-field; most of them have sprung up since the year 1887. By reference to *In Iron Belt* of the issue of October, 1891, there is an editorial, headed "Pocahontas Flap Top coal region," beginning of page 3 and ending on page 6, which pages are filed as part of this answer, marked "iron oelt," which extends this field to Tazewell and Wise counties, Virginia, and Mercer, McDowell, Wyoming, and Raleigh counties, West

Virginia. As recently as November, 1896, the enterprising coal men and business men of that section issued from Bluefield, West Virginia, a supplement to the Daily Telegraph, a newspaper published at Bluefield, West Virginia, entitled "The Great Pocahontas Flat Top coal-field. Industrial edition of the Daily Tele-
102 graph," which in a bound volume contains many pages, and a history, sketch, and illustration of most all the coal plants in the Pocahontas Flat Top coal-field. The initial article of this supplement is written by Capt. J. A. Welch, a civil and mining engineer of large experience and practical geologist, and is entitled "the Pocahontas Flat Top coal-field;" a brief history of its location and development (copyrighted). Capt. Welch states that he explored this coal region as early as the year 1873. He states that the bed now mined is 13 feet thick at Pocahontas, Virginia. He says that it has been determined by actual survey of the outcrop that there is one-third barren territory, leaving two hundred and four thousand eight hundred acres underlaid with the bed now mined; that it will require four hundred and seventy-four years to exhaust the field at the present rate of consumption, based on the output of 1894 (in coal and coke, three million eight hundred and eighty-eight thousand and fifty-eight tons); that if the output is doubled, which he thinks is quite probable, it will require two hundred and thirty-seven years to exhaust this great fuel supply; that these figures have been carefully compiled to show the extent of the industry that can be built up in that district for years to come.

Respondent wishes to lay before the court the bound volume of this supplement, and refers specially to pages 1 to 17, inclusive, and makes them a part of this answer.

Respondent files as part of this answer clippings of other publications, marked "clippings." The terrible explosion in the mines of the Southwest*west* Virginia Improvement Company in its early history; the great strikes of recent years in that coal-field have served none the less to make history under the name of Pocahontas coal-fields than have the successes and fortunes of the operators.

IV. Your respondent is advised that words in common use are the common property of the people, and no one can acquire an exclusive right to such a word by adopting it as his trade-mark; especially is this applicable to geographical names. Complainants would have the court believe that people from the city of Philadelphia, as recently as 1882, not only discovered that part of Virginia and West Virginia composing this great coal-field, but that they discovered the name of "Pocahontas" and adopted it "as a purely fanciful appellation." The word and name "Pocahontas"
103 is common among all English-speaking people, and figures not only in the history and romance of America, but of the *the* mother country, existing among the aborigines about the banks of the Chickahominy when Virginia was first sought to be colonized. There are not less than 12 post-offices in the United States bearing the name "Pocahontas," and many counties in the States of the Union, as well as many towns, your respondent is informed, bear this historic name. The country in and about this

section was then thickly inhabited, especially along about Abb's valley, in which valley the massacre by the Indians of the Moore family took place in the year 1786, and your respondent has reason to believe that the Indian name of "Pocahontas" was suggested from this and other similar incidents in the neighborhood, a belief borne out by the fact that Indian names appear to be popular appellations for collieries in that vicinity. For example: The Powhatan Coal and Coke Company, Rolfer Coal and Coke Company, Shawnee Coal and Coke Company and Indian Ridge Coal and Coke Company.

V. Your respondent further avers that the word "Pocahontas" is now used, and has been for many years, as a generic term or name for the particular coal produced in that vast coal region.

The terms "Pocahontas coal" and "Pocahontas coke" are descriptive of the peculiar elements or want of vicious elements in these products; that — is practically a smokeless coal; that it has intense heating power of great value for steam purposes; that the quality of its coke is highly prized, especially its burden powers, so essential in the smelting of crude ores, and carrying a very low per cent. of sulphur and phosphorous. A large number of the different collieries, for this descriptive purpose, have for years had on their cards, letter-heads and bills the words "celebrated Pocahontas Flat Top coke and coal," or such similar expressions. Copies of these letter-heads are filed as parts of this answer in one batch, marked "Letter-heads."

Your respondent avers that the words "Pocahontas" or "Pocahontas coal" have, by common custom and usage, become descriptive words—descriptive phrases—for the purposes of designating the generic and inherent qualities of that great coal-field.

VI. Your respondent further represents that from the force of necessity, as well as for the information of the trade at large, the word "Pocahontas" is absolutely essential to, and inseparably connected with, the marketing of the products of this vast field, and for years past this name has been used, and every year increased in use, without objection, by every institution connected with
104 this field, and its use has assumed such proportions as cannot now possibly be controlled.

In the limited time allowed respondent to prepare this defence he has selected from his correspondence the letter-heads of many of the collieries in this field, which he has hereinbefore filed in a batch as part of his answer, and the following prominent collieries have in conspicuous places the following advertisements: Roanoke Coal & Coke Company, "miners and manufacturers of Pocahontas coal & coke;" the Arlington Coal & Coke Company, "shippers of celebrated Pocahontas coal;" Peerless Coal & Coke Company, "producers of the Pocahontas Flat Top coal & coke;" Caswell Creek Coal & Coke Company, "operators in the famous Pocahontas coal-field;" Eureka Coal & Coke Company, "miners and shippers of the celebrated Pocahontas coal & coke;" Shawnee Coal & Coke Company, "producers of Pocahontas Flat Top coal and coke;" Greenbrier Coal & Coke Company, "producers — celebrated Poca-

hontas coal and coke;" the Tidewater Coal & Coke Company, "miners and shippers of celebrated Pocahontas Flat Top coal;" McDowell Coal & Coke Company, "miners and shippers of celebrated Pocahontas Flat Top coal; manufacturers of coke;" Indian Ridge Coal & Coke Company, "miners and manufacturers of Pocahontas coal and coke."

Respondent avers and charges that these letter-heads have been in use for years with the full knowledge and consent and approbation of the Southwest Virginia Improvement Company and of Castner & Curran.

Respondent can produce on the hearing of this cause many similar letter-heads, which go to establish not only the free and unrestricted use of the word "Pocahontas" as a geographical name, but is an unrestricted word, used now in the commercial world as descriptive of the products of that vast region. There is now published, and has been for years, a newspaper in the town of Pocahontas called "Pocahontas Head Light;" the principal hotel in that town is called the "Pocahontas inn." About or before the year 1886 a company was organized and operated in Virginia and elsewhere, styled "Pocahontas Coal Company," which became a combination or pool, and to which for years all the collieries in the said coal-field sold their coal—were practically forced to do so, which said last-mentioned company had complainants as their agents, and continued in business up to about the time the Norfolk and Western railroad went into the hands of receivers (up to some time in 1895 or 1896), and the use of this name of "Pocahontas Coal Com-
105 pany" was with the full knowledge and approval of complainants and of the Southwest Virginia Improvement Company, the alleged vendors of complainants' pretended trademark.

Your respondent further represents that in the fall of 1895 a company was formed in the State of West Virginia styled the "Pocahontas Company," with headquarters at Bramwell, W. Va., which your respondent thinks has been chartered under the laws of West Virginia, and practically takes the place of the old pool known as the "Pocahontas Coal Company," and your respondent understands has taken charge of all the collieries in the field who are willing to join in the employment of Castner & Curran, excepting the Pulaski Company, Upland Company, Houstan Company, Crozier Company and the Southwest Virginia Improvement Company. This said "Pocahontas Company" began disposing of the coal they controlled to Castner & Curran about the 1st of January, 1896. Your respondent finds also that another company was chartered under the laws of the State *of the State* of West Virginia about the 12th of March, 1895, with headquarters at Bluefield, styled the "Pocahontas Company," a copy of which charter is filed as part of this answer, marked "charter." The town of Pocahontas is composed of between four and five thousand inhabitants, and has been a post-office since 1882.

VII. Your respondent is advised that if ever Castner & Curran had any semblance of right whatever to the use of the word "Pocahontas," or that if ever their vendors, the Southwest Virginia Im-

provement Company, ever had any claim to the same word, "Pocahontas," that they are both now forever estopped from claiming or attempting to claim, an exclusive monopoly of this word, from having permitted the same use of it to be made by persons and corporations almost too numerous to be mentioned, throughout the commercial world for years past, and at the present*ed*, and which has been used for the purposes of commerce identically as respondent now uses it. The foregoing instances, and many more, which will be proven, demonstrate clearly the impossibility, as well as the great wrong, in attempting to suppress the use of a name which is the common property of the commercial world. Your respondent further represents that the attempt to monopolize the word "Pocahontas" by the complainants in this suit is the crowning effort in the ambition of the Messrs. Castner & Curran to do what they have attempted to do for years, that is, to monopolize the whole trade in coal of the vast Pocahontas Flat Top coal-field.

106 Their own history, given by their bill, is but a part of the scheme of their ambitions. As before stated, more than ten years ago the pool of "Pocahontas Coal Company" was formed, and your respondent avers that such an organization surrounded this pool as forced the producers in the Pocahontas Flat Top coal-field, as fast as colliers therein sprang into existence, to sell their coal to this pool at prices fixed by complainant. Year by year these collieries, though struggling against it, were forced to accept less from Castner & Curran, until it is believed the effect of it will eventually force many of them out of existence. The complainants were the sole agents of this pool. By like combinations they have now become, ostensibly at least, the sole agents for all of the collieries, except the two which your respondent now represents, and if the complainants succeed in this suit, it is plain and conclusive that they will have a complete monopoly of the coal trade in the Pocahontas Flat Top region, and will forever stifle and suppress independent commercial traffic and independent competition. Your respondent further avers that one special object, he verily believes, of this suit is to further a concerted scheme to force the Browning mines, whose coal your respondent is selling, into the pool of Castner & Curran.

VIII. Complainants charge in their bill that they gave notice to your respondent that he was infringing upon their said trade-mark (the existence of which your respondent denies). On the 30th of April, 1896, your respondent received a letter from Castner & Curran, stating that they were informed your respondent was "offering to sell Pocahontas coal," and stating that they had patented this name. Said letter is filed as part of this answer, marked "C. & C." On the 13th of November, 1896, your respondent received a letter from J. Walter Douglass, of Philadelphia, claiming to be the attorney of complainants, in which, among other things, is written as follows: "Mess. Castner & Curran, of this city, the legal owners of the trade-mark 'Pocahontas,' registered September the 29th, 1885, have placed in my possession a postal card issued by your alleged company, containing the word 'Pocahontas' in connection with coal, which is a deliberate and wilful infringement upon the trade-mark rights

of my client." Said letter is filed as part of this answer, marked "Douglass."

Respondent also files another letter of Castner & Curran, of date November 6th, 1896, marked "C. & C., No. 2," in which, among other things, is written as follows:

107 "We are informed that you are offering coal to the public under the name 'Pocahontas' in violation of our registered trade-mark of September the 29th, 1885, of the word 'Pocahontas' for coals." From these letters it would — naturally inferred that complainants had a registered trade-mark of their own, registered either under the laws of the United States or of some State, but by reference to their bill, clause VII, it will be seen that they purchased this pretended trade-mark from the Southwest Virginia Improvement Company as recently as April 1st, 1895, and do not pretend to disclose anywhere in the record which they have made that this purchased article is a registered trade-mark, leaving the conclusion to be drawn that complainants were either mistaken at the time the letters were written to your respondent, or willfully attempting to deceive and intimidate your respondent, as per the letters above referred to. Your respondent is advised that if complainants had in reality the trade-name "Pocahontas," as they pretended, in 1885, then they were doing what they now complain of, and what every one else interested has been allowed to do, used it in spite of the pretended right of the Southwest Virginia Improvement Company. This of itself is sufficient to estop complainants. Your respondent in no way, manner, shape or form attempted to simulate the advertisements of Castner & Curran, or in any way to connect himself with them or their advertisement. Respondent never heard of the Southwest Virginia Improvement Company claiming any trade name or mark, or of Castner & Curran claiming it under that corporation, until he saw it in complainants' bill, and could not, therefore, attempt to pirate it or simulate it in any way. He advertised the commodity in which he dealt independently as Pocahontas coal or Pocahontas Flat Top coal, as he truthfully and lawfully had a right to do.

Your respondent submits to the inspection of the court a copy of "The Coal Trade Journal," published in New York April 14th, 1897, and refers specially to page 11, on the first leaf, to the advertisement of complainants, part of which is as follows: "Castner & Curran, general sale agents for the celebrated Pocahontas bituminous coal; the best steam coal mined." In this same journal there is an extended advertisement on a leaf colored yellow, which is referred to as part of this answer, part of which is as follows: "Castner & Curran, general agents for the Pocahontas smokeless semi-bituminous coal." On their letter-head, filed as part of this answer above, is as follows: "Castner & Curran, general agents Pocahontas

108 coal." Thus it will be seen that neither of these three advertisements are similar, but each of them vary.

IX. Your respondent is informed, and so believes and avers, that Castner & Curran are mere agents to market the coal of those who entrust it to them; that they are neither producers nor owners of

the coal, and for this reason respondent is advised that they are not entitled to the use of any trade-mark.

X. The respondent denies every allegation of clause 12 (XII) of complainants' bill except he charges that he has truthfully represented to the trade, and now shows to the court, that he is selling coal of as good quality as that offered or handled by the complainants, and he charges that the coal offered by him comes from vein No. 3 of the "Pocahontas region," from which is mined the only coal handled by the complainants. He now here again denies that he has ever been guilty of any fraud or deception of any kind upon Castner & Curran, or of simulating them, or their trade or business in any way. Your respondent is accused of putting spurious, or impure coal upon the market under the name of "Pocahontas" coal. This is untrue wherever stated or intimated in the record presented by complainants. Your respondent was selling the coal prior to the application for, and the granting of, the injunction in this cause, from two mines in the Pocahontas Flat Top coal-field, to wit: the Browning mines and the Indian Ridge Coal and Coking Company. In sec. 10 of complain-ts' bill they admit that they handled and sold the coal from Indian Ridge Coal & Coking Company up to the 1st of November, 1896, and that, too, of course, truthfully under the name of "Pocahontas" coal, and, while they do not dare say so, yet they would insinuate, after thus selling this very coal for years, that they have ceased to do so from this mine on account of its quality. This insinuation is untrue, for it is a fact, that the Indian Ridge Coal & Coke Company refused to enter into a contract to be controlled by the agency of complainants. The Browning mines are in Tazewell county, Virginia, and is on the adjoining land to the mines of the Southwest Virginia Improvement Company, and is of the celebrated Nelson, or Pocahontas bed, No. 3, and is about the thickness of the openings of the Southwest Virginia Improving Company, and in close proximity thereto, and its analysis practically the same—in fact, it is precisely the same coal mined by the Southwest Virginia Improvement Company, and your respondent avers that most, if not all, of the structures of the Browning mines and the mine entry are within the corporate limits of
109 the town of Pocahontas itself. Recurring again to the Indian Ridge Coal & Coking Company's mines, your respondent avers that the seam there mined is about 5 feet thick, and that it is an extension of said seam No. 3. It has always been classed without question along with the Pocahontas Fat Top field; it is in that field, so known and accepted, and by analysis and practical use is shown to contain the same constituent qualities as the coal of the Southwest Virginia Improvement Company. Your respondent files as part of his answer, *containing* an analysis by one W. B. Wiley, an expert chemist, of most all the coal of the different collieries in that region, including the Indian Ridge Coal & Coke Company, and its analysis would indicate that this mine is over an average in good quality. Analysis, marked "Analysis." Maps and affidavit of Kilpatrick show that in close proximity to the Indian Ridge mines are collieries from which the complainants are confess

edly selling coal, the output of which mines is exactly similar to the Indian Ridge mines. Your respondent will exhibit with this answer the affidavit of Worth Kilpatrick, president of the Indian Ridge Coal & Coke Company, together with maps exhibited with the affidavit, giving a history of transactions with complainants, how long they sold the coal of this mine, where the mine is situated, the quality of the coal, and that complainants have made an effort to get the coal of this mine since respondent has been selling it.

XI. Respondent, referring to section VIII of the bill, denies that the complainant has caused by inspection or otherwise a standard or grade of coal which is known as "Pocahontas." He avers that all the collieries in the Pocahontas region, as in all other coal-fields, subject their output to inspection to eliminate them from foreign substances. He avers that the mine-owners in the Pocahontas field have paid and now pay one cent per ton to cover the expenses of inspection; that the coal sold by respondent is inspected and brought to the same purity and grade as that handled by complainants.

He avers that no inspection changes the inherent qualities of the coal, but simply expunges foreign substances; that the coal as it lies among the hills is Pocahontas coal; that it is Pocahontas coal before inspection by any one, and its name is not effected by the fact of any kind of inspection.

Respondent is advised that complainants cannot be heard to complain that the Indian Ridge coal is now impure in the hands
110 of your respondent, when for years past it was represented as perfect in the hands of the complainants.

XII. Your respondent most humbly apologizes for the length of this answer, but his excuse is that it not only means all to him, but much to every individual whose fortune is staked in operations of the great coal-field. If he cannot truthfully represent the commodity in which he deals as coal from the Pocahontas field, then he, nor no one else who cannot do so, can sell the coal. Your respondent has reaped no advantage, pecuniary or otherwise, off or from the complainants in the sale of his coal, and he submits that, under the statements in his answer, which he will be amply able to verify by proof, he will not be required to render any account of his dealings, much less pay anything to the complainants. If respondent is further enjoined from selling coal, as prayed for by complainants, he will be forced to violate many contracts in which he is engaged, and will be subjected to great loss and damage.

XIII. As a fact scarcely worth mentioning, your respondent finds that he is charged in paragraph 13 of the bill with having confederates who are conspiring to invade the rights of complainants. This is untrue; your respondent has no confederates. He is also charged with trading under the name and style of "Pocahontas Coal & Coke Company, ostensibly a corporation of West Virginia, in reality not incorporated under the laws of the States of West Virginia or any other State, being simply a name or title assumed by the said defendant for the purpose of selling his coal as 'Pocahontas' coal or as your orators' coal, and of thereby deceiving the public." Your respondent fails to see what bearing the fact that he

is trading under the name and style of Pocahontas Coal & Coke Company has upon the issue in this case. He has never pretended that he is an incorporated company; never so published to the world, and it is a matter of every-day occurrence throughout the commercial world that a single individual in trading assumes the name of a company. Your respondent repeats his denial of any intimation that he is selling coal as the coal of complainants, humbly praying to have it remembered that he is truthfully and honestly selling Pocahontas coal as known and accepted all over the country, as he lawfully has a right to do.

XIV. Complainants nowhere attempt to show, and they cannot show, that respondent has in any way counterfeited or simulated their pretended trade-mark.

111 XV. So far as any information has ever reached your respondent, the coal sold by him has received commendation, and he files herewith letters from his customers to this effect in a batch marked "Commendations."

XVI. Your respondent has been handling the products of said coal-field, to wit: coke since the — day of November, 1893, and coal since April, 1896, and has been advertising the same in different ways as the product of the Pocahontas coal-field with the full knowledge of both the Southwest Virginia Improvement Company, and of complainants.

Your respondent has built up a large trade, which is increasing every day, and he hopes to make it useful to the great field in which he is operating.

XVII. Your respondent does not admit, but, upon the contrary, denies any such trade name or mark, as claimed by the complainants in their bill, whether used by them or the Southwest Virginia Improvement Company, and denies all other allegations in said bill which he has not admitted in this answer. And, having fully answered, prays hence to be dismissed with his costs, and further prays that this answer, being sworn to, be treated also as an affidavit made by your respondent.

WILLIAM H. COFFMAN.

HENRY & GRAHAM,
Tazewell, Virginia, Counsel for Respondent.

In the Clerk's Office of the Circuit Court of the United States for the District of West Virginia.

W. H. Coffman, respondent in the foregoing answer, this day personally appeared before me, and made oath before me in my said office that the statements in the foregoing answer, so far as made upon his own knowledge, are true, and so far as made upon the knowledge and information of others, he believes them to be true.

W. H. COFFMAN.

Given under my hand, the — day of May, 1897.

——, ——.

112 (Endorsed:) United States circuit court, district of West Virginia. In equity. W. H. Coffman, doing business under

the name and style of the Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, *ads.* Samuel Castner, Jr., and Henry B. Curran, copartners, trading under the firm name and style of Castner & Curran. Answer. Filed in open court this 4th day of May, 1897. L. B. Dellicker, clerk.

(Entitled "Mineral Wealth of Virginia.")

The preface to McCreath's report, written by Kimball and the portions of the report itself referred to in the foregoing answer, are in the words and figures following, to wit:

Preface.

The early months of 1882 opened a new era in the economic history of the South by the combinations resulting from the transfer of ownership of the Atlantic, Mississippi and Ohio railway to the Norfolk and Western Company, its new associations arising from the completion of the Shenandoah Valley railway to its junction at Roanoke, and the operating arrangements then effected by contracts between these lines and their southern connections for the creation of the new direct trunk route between the North and South, known as the Virginia, Tennessee and Georgia air line.

The country traversed by this system had long been known to be rich in minerals, in fact, supposed to be richer than any other portion of the Union; but though this section had been productive in coal, iron, lead, zinc and copper from the early colonial times, and its iron and lead had furnished material sinews of war in the campaigns of the Revolution, as well as in the latter stirring struggles of the Confederate States, the construction of mineral branches to develop these industries had not been inaugurated, nor sufficient encouragement given to the local traffic of the line, that vital element to the permanent prosperity of any railway system. The new management took hold resolved to make every mile pay its
113 quota to the general revenue, and to develop every source of income in coal, iron, woods, cattle and miscellaneous business.

Considerable traffic was already established, iron in particular was an important element. Some twenty small furnaces of from five to ten tons' daily capacity were in operation, producing a superior quality of cold-blast charcoal iron in wide demand for the manufacture of car wheels, but retarded in extension by the gradual diminution of fuel supply and by distance from railway communications.

The first necessity was clear, fuel, and this was met by the construction of the New River branch of the Norfolk and Western (seventy-five miles) into the Flat Top district, and the opening of the coal-fields there for an almost unlimited supply of the finest qualities of coal and coke. The railways were prepared for heavy mineral traffic; with well-ballasted road-beds, steel rails and substantial structures, and the equipment throughout of the best quality.

Exact and reliable knowledge of the probable amount, quality

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and value of the sources of traffic became a necessity, and at an early day received the attention of the new management. Upon consultation with many of the leading iron masters of Pennsylvania, Mr. Andrew S. McCreath, chemist to the State geological survey of Pennsylvania, was recommended as an eminently capable, trustworthy and conservative person to examine, sample and analyze the various mineral developments tributory to the lines, and prepare a report upon their commercial values.

The original instructions issued were to examine and report on developed properties only, but the actual field of labor gradually extended until a much wider scope and area were included.

Position knowledge as a basis for estimates of future mineral traffic being the main object of the management, the instructions were to report on everything good, bad and indifferent just as found, and the field-work extended through the months of May, June, July, August and September, 1882, embracing the line of the Shenandoah Valley, the Norfolk and Western, west of Roanoke, and portions of Tennessee tributary to this system. During the fall of 1883 and the spring of 1884, additional work has been done, and two months have been spent in a more detailed examination of the Cripple Creek iron region and the Flat Top coal-fields. The results will be found embodied in the accompanying pages. The object of this report is simply to furnish reliable information to all persons inquiring
114 into the resources and condition of the territory tributary to the railways.

It is unnecessary to remark upon the care and labor given to this examination, or the entirely conservative character of the information now furnished. This has been satisfactory to the companies, and is presented to the public with this indorsement.

FREDERICK J. KIMBALL,
President Norfolk and Western and Shenandoah Valley Railroad Companies.

Philadelphia, 1884.

(Pp. 110 & 111.)

The quantity of coal in the Flat Top coal-field is very great. In the area shown on plate No. 2 of this report, there are numerous openings on the Nelson or Pocahontas coal bed (*No. 3* of the section), and also some few openings on the upper beds, No. 5 and No. 6. Coal bed No. 3, the Nelson or Pocahontas bed, is opened up on the outcrop on all, or nearly all, of the small streams between Lamont creek and Crane creek.

On Coal branch, the Pocahontas bed (No. 3), has been extensively mined at the Pocahontas mines of the Southwest Virginia Improvement Company.

At these mines the bed has a sandstone and slate roof with slate floor. Its structure in No. 1 or east mine is as follows:

1. Coal, long (and not included in samples)	0′	8″
2. Coal with irregular thin slate streaks	4	8
3. Slate (not included in sample)	0	0½
4. Coal	6	0
5. Slate (not included in sample)	0	3
6. Coal	1	0
Total thickness of bed	12′	7″
Thickness of coal to be mined	11′	8″

Samples for analysis were taken from the mine at different points as follows:

1. From airway and about ten feet from outcrop.
2. From first cross-entry, one hundred and fifty-three feet from outcrop.
3. Main entry, left side, one hundred and sixty-five feet from outcrop.

115 4. Main entry, left side, one hundred and eighty-five feet from outcrop.

5. From same, two hundred and eight feet from outcrop.

They yield:

Water	.932
Volatile matter	20.738
Fixed carbon	73.728
Sulphur	.618
Ash	3.984
	100.000
Color of ash	Cream.
Phosphorous	0.0013

At the present time the company are mining the large 6-foot bench of coal, leaving the upper 4′ 8″ coal bench in the roof, and the 1′ 0″ coal bench in the floor, with the expectation of mining them both out hereafter, and thus mining over the whole area covered by these mines the whole 11′ 8″ of coal in the bed.

In actual working of the coal bed the small ½-inch slate parting is necessarily mined and shipped with the run of mine coal.

A sample of the run of mine coal from the No. 1 or east mine, as shipped to and used by the Shenandoah Valley railroad, analyses as follows:

Water	.684
Volatile matter	19.964
Fixed corbon	73.021
Sulphur	.656
Ash	5.675
	100.000

Color of ash, cream.

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Coal bed No. 3 is also opened on the west side of Coal branch, at mine No. 2 of the Southwest Virginia Improvement Company.

In the face of the north entry the coal bed measures thus: (Lathrop.)

(Pp. 120 & 121.)

Tests of Pocahontas (Flat Top) and Cumberland coal—Report of engine and coal trials.— * * * Having executed a carefully conducted series of tests of each of the classes of engines in
116 use on the Shenandoah Valley railroad with Pocahontas and with B. & O. Hampshire coal, I beg to report the following results:

Coal and water consumption.—The annexed table gives the average of car miles (two empties, one load), ton miles, pounds of coal per car mile, pounds of coal per ton mile, and equivalent evaporation at 212° Fahrenheit in pounds of water per pound of coal.

Beyond mentioning that the three trips made when the conditions of weather were unfavorable have been left out of the results tabulated, these tables will speak for themselves, and need no further comment.

PAGES FOUND VERTICALLY

Engine and coal tests.—Average of results: Total No. of pass. trials, 8; total No. of freight trials, 24. Pocahontas coal.

Engine 22.	Car miles.	Ton miles.	Lbs. coal per car mile.	Lbs. coal per ton mile.	Equiv. evaporat'n at 212° in lbs. water per lb. of coal.
Through freight	1,812	44,316	7.5	0.309	5.16
Local "	1,992	39,595	7.14	0.360	4.53
Engine 44:					
Through freight	2,689	66,687	4.99	0.202	10.05
Local "	2,538	57,929	5.12	0.235	8.91
Engine 8:					
Pass. trains	779	20,094	9.8	0.418	9.7

Engine and coal tests.—Average of results: total No. of pass. trials, 8; total No. of freight trials, 24. Hamp. and Balto. coal.

Engine 22.	Car miles.	Ton miles.	Lbs. coal per car mile.	Lbs. coal per ton mile.	Equiv. evaporat'n at 212° in lbs. water per lb. of coal.
Through freight	1,989	39,403	7.92	0.389	4.93
Local "	1,756	38,870	8.94	0.402	4.44
Engine 44:					
Through freight	2,490	62,955	6.54	0.274	7.85
Local "	2,820	58,919	5.80	0.285	7.17
Engine 8:					
Pass. trains	779	20,094	12.8	0.512	6.53

Average per Cent. of Cinder and Ash per Ton of Coal.

Engine 44, Pocahontas	4.98	Engine 44, Hamp. and Balto.	7.40
Do. 8, do.	1.05	Do. 8, do.	1.47

This table shows the net coal used for the actual haul from coupling up to cutting loose, leaving out all coal used during lay-overs, the water level, steam pressure and depth of fire on bars being practically the same at each trial when taking hold and letting go.

W. H. COFFMAN, ETC. 91

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118 (Pp. 124 & 125.)

General Remarks Concerning the Coals Used.

Pocahontas coal.—This coal makes a very bright, hot fire. It cokes on the grate even when slack is used, and but a small proportion is carried off the grate by the draught. It does not need much hooking up. One trip on No. 8 was made between Roanoke and Hagerstown, two hundred and thirty-nine miles, without a hook being put into the fire. The trains never stalled for the want of steam on the heaviest grades, and the engines throw much less fire than with the B. & O. coal.

The injectors could be kept full on when climbing the grades without causing the steam pressure to fall, and the steam pressure could be kept at blowing-off point when the engines were working their hardest without particular difficulty.

B. and O. Hampshire coal.—This coal does not make such a hot fire as the Pocahontas coal. There was always a dull, lurid appearance, contrasting markedly with the white-hot hue of the Pocahontas coal fire. This B. and O. coal — into holds, and requires constant hooking and leveling. The dust coal seemed to fly right off the shovel out through the stack. With a light fire the coal seemed to be dancing on the grate, and would not coke as the Pocahontas coal did.

(Pp. 127 to 129.)

The cost of mining and placing upon the railroad the coal from the Pocahontas coal (bed No. 3) should compare favorably with the mining and shipping of the standard steam and coking coals of the country.

The coal lies well for mining. The outcrop sweeps smoothly around the points of the ridges overlooking the Bluestone and along the sides of the ravines of the streams leading into it. From one to two and a half miles up these streams the outcrop touches the stream level, some 200 or more feet above the level of the Bluestone. The coal is lying nearly horizontal, and thus offers most favorable opportunities for the easy location of collieries and the economical working of the coal, entirely above water level, without water pumping and with cheap access to the New River division and the Flat Top extension of the N. & W. R. R. There is an ample supply of suitable timber on all the streams leading into the Bluestone to furnish all that will be required in mining operations. At the present rate of wages the cost of putting run-of-mine coal upon the cars, with 6 or 7 foot bed of clean coal, good roof and
119 floor and free from faults, should not exceed 60 cents per ton, actual cash outlay. This applies to the Pocahontas coals' bed. The cost of running the upper coals, somewhat smaller in size, would perhaps somewhat exceed this amount. Unless there be some special value to the smaller coal beds in their exceptional character, it may be expected that the mining for a considerable period will be chiefly confined to the Pocahontas coal bed No. 3.

On Mill creek, Bell branch, Simmons creek, Flipping creek and their branches, the large coal bed can now be easily attacked and coll-eries planted directly tributary to the Norfolk & Western railroad. The cost of much of the material for the necessary plant for coll-eries and coke veins is probably somewhat less than the costs for the same material in most of the other coal and coke regions, and labor is abundant and at fair prices.

Market for the coal and coke.—It having been shown that the coal exists in great quantity in the Flat Top coal field; that it is of excellant character; that it lies favorably for easy opening up of coll-eries and for economical mining, and that the Norfolk & Western railroad runs close to their mining locations, rendering them available for use immediately, the question arises: What is the present market for this coal and coke, and what is the reasonable prospect for increase and widening out of such market?

The market for coal is:

1. The railroad demand for locomotive use on the Norfolk & Western and Shenandoah Valley railroads—the combined system embracing 800 miles of railway.

2. Local sales along these railroad lines and in the regions tributary to them.

3. Sales on the line of Norfolk & Western railroad should extend as far southwest as Chattanooga.

4. Sales on the Norfolk & Western railroad at Lynchburg and points eastward.

5. Sales along the lines of the Virginia Midland, Richmond & Danville and Seaboard and Roanoke railroads, including the Richmond market, to which the Flat Top coal is nearer by 30 miles than its present supply.

Tidewater market at Norfolk.

7. Sales on the Shenandoah Valley railroad can go northeast until they reach the region fully supplied by the Cumberland coal.

120 The coke market is:

1. For present use on the line of the Norfolk & Western and Shenandoah Valley railroads.

2. For future use along the R. R. line when the opening up of the supply of rich Cripple Creek iron ores shall have made that region a large and steady producing pig-iron district. An increasing and profitable coke trade may be properly looked for; for coke is the typical blast-furnace fuel, and the rates of its increased market in southwest Virginia may be expected to exceed the rates of increased coal consumption. The coke trade should spread southwest until it meets the Alabama coke, and northeast until it meets the Connellsville coke at such points as would give these latter fuels decided advantages in distances of transportation.

It is not within the scope of this report to work out more specific details. The probable increase in tidewater shipments from Norfolk and other extensions of the market in the directions named are sufficiently obvious.

The portions of the work entitled The New River Cripple Creek

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Mineral Region by McCreath & d'Invilliers, referred to in the foregoing answer, are in the words and figures following, to wit:

Preface.

The Norfolk and Western Railroad Company first directed attention to the mineral region tributary to its then proposed "Cripple Creek extension" by the publication of a report made by Andrew S. McCreath in March, 1883, entitled "The Mineral Wealth of Virginia," which treated of the entire mineral territory tributary to the Norfork and Western and Shenandoah Valley railroads. A subsequent and revised edition of this report was made in July, 1884.

* * * * * * *

(Page 150.)

The New River Cripple Creek Mineral Region.

Chapter V.—Coal and coke.

No report on the New River Cripple Creek mineral region would seem complete without at least a brief reference to the Pocahontas Flat Top coal-field, from which it will undoubtedly and naturally draw its supply of coal and coke. Whether it be in the pro-
121 duction of pig iron within the district already described, or in the utilization of the same in the various manufacturing industries which generally accompany the establishment of blast-furnace plants, this coal-field possesses within itself coal of such unusually good quality as to be fit for all purposes for which fuel is required in such industries, and in such quantity as to readily meet any demand which may be made upon it. This coal-field is now so widely known, and has already been so frequently described, that it would seem superfluous to speak of it here in detail. But as an illustration of its rapid growth as a producer of coal and coke, the following table of shipments since it was first opened in 1883 may be instructive:

Year.	Tons of 2,000 lbs.	Year.	Tons of 2,000 lbs.
1883	105,805	1885	651,987
1884	272,173	1886	924,361

Thus far in 1887, the increase in shipments has averaged nearly 50 % above those of the previous year; and in view of the increasing demand for this coal at tide water, and the numerous new connections being made, it is fairly probable that the output will not fall below 1,500,000 tons for the year. As is well known, the coal in this Pocahontas Flat Top coal-field occupies a very large area in Tazewell county, Virginia, and in Mercer, Wyoming, McDowell and Raleigh counties, of West Virginia. Throughout a large portion of

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the Flat Top Mountain area the beds are above water level and lie most conveniently for cheap development and mining. A considerable portion of this field has secured outlets to markets through the New River division of the Norfolk and Western railroad, and the numerous laterals extending along the Bluestone and its branches, while the near completion of the tunnel at the head of Coal creek on to the waters of Elkhorn will open up an additional territory on the north side of McDowell county.

Geologically, these coals belong to the lowest member of the coal measures, and are the equivalent of the Quinnimont group of the Kanawha region and the Potteville conglomerate of Pennsylvania. The section at Pocahontas shows the presence of at least three workable beds above water level, although almost the entire output of the region at present comes from the No. 3, Nelson or Pocahontas bed.

This handsome coal bed is everywhere present so far as explored, with a workable thickness, being 11′ 3″ in the vicinity of
122 Pocahontas, and holding its workable dimensions through the field for five miles eastward to the waters of Flipping creek, where it becomes split into two beds about 4½ and 5½ feet thick.

To the west of Pocahontas, along Laurel creek, for a distance of eight miles, the bed carries its full thickness fairly well, and shows nearly the same section for a long distance north of the dividing ridge on the waters of the Elkhorn and the Tug Fork of Sandy.

Reference to any map of that region will show what a large area of country is underlaid by this coal bed. It should yield at least 10,000 tons of coal to the acre, while the two upper beds should each add probably 6,000 tons more.

The good quality of this coal had been well established by numerous tests, both in the lab-ratory and in actual practice, and its character may be conveniently shown by the following table, which comprises the analysis of fifteen average samples taken from different parts of the field:

Number.	Water.	Volatile matter.	Fixed carbon.	Sulphur.	Ash.
1	.932	20.738	73.728	.618	3.984
2	.684	19.964	73.021	.656	5.675
3	1.398	19.902	71.171	.834	6.695
4	.492	19.278	73.948	.847	5.435
5	.768	18.532	71.170	.670	8.860
6	.560	18.545	74.683	.712	5.500
7	.568	19.337	77.335	.800	1.960
8	.516	17.639	74.272	.998	6.575
9	.786	18.939	76.077	.793	3.405
10	.564	18.166	72.147	.683	8.440
11	.600	18.020	76.833	.622	3.925
12	1.366	17.484	74.625	.575	5.950
13	3.336	18.394	72.216	.549	5.505
14	1.092	17.148	77.319	.711	3.730
15	1.506	20.089	75.295	.875	2.235

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To make a more complete comparison between these Flat Top coals and some other well-known standard coals,* the following table is added:

123 Name of coal.	Water.	Volatile matter.	Fixed carbon.	Sulphur.	Ash.
1. Flat Top coals—average of 15 samples.....	1.011	18.812	74.256	.730	5.191
2. Cumberland coal, average of 2 samples.....	.958	19.139	72.708	.787	6.408
3. Clearfield coal, average of 3 samples.....	1.186	22.168	69.270	.933	6.443
4. Broad Top coal.....	.594	17.551	71.334	.976	9.545
5. Connellsville coking coal.....	1.260	30.107	59.616	.784	8.233
6. Westmoreland coal.....	1.430	36.145	55.891	.939	5.595
7. Cardiff coal, Wales...	2.552	33.123	56.774	1.326	6.225

Not only has the Pocahontas coal been found to answer all the requirements of a good steam and rolling-mill coal, but it has proven itself a first-class coking coal as well. Abundant facilities exist for the location of coke-oven plants on both sides of Flat Top mountain, where also a plentiful supply of water is always at command. Indeed, in the possession of such sites near the mines, and with the advantage of a large and cheaply mined coal bed, there is nothing to retard the increase of coke-oven plants to any extent the market may demand. Already the enlargement of this branch of the coal industry has been almost as phenomenal as that of mining and shipping the raw coal itself. The directory accompanying this report will show how large the present capacity for furnishing coke is, and the building of 1,000 additional ovens this year, made necessary by the increased popularity of this coke, assures a very largely increased output in the near future. This coking field is within 100 miles of Pulaski and about 15 miles nearer to Radford.

The Pocahontas coke has already been largely used in the blast furnaces of Roanoke and Lynchburg, and in numerous foundries in the South and Southwest, and its good quality is made apparent from the three following analyses of samples taken by us from the two active operations in the region:

	No. 1.	No. 2.	No. 3.
Water.....	.182	.196	.664
Volatile matter.....	.719	.494	1.059
Fixed carbon.....	92.248	92.285	92.816
Sulphur.....	.565	.677	.548
Ash.....	6.286	6.048	4.913
Total.....	100.000	100.000	100.000

* All of these samples were taken personally by us, and will be found incorporated and localities described in the reports on "Mineral wealth of Virginia" and "West Virginia and Ohio railroad."

124 No. 1. Southwest Virginia Improvement Co.'s ovens, Pocahontas; sampled January, 1887.

No. 2. Southwest Virginia Improvement Co.'s ovens, Pocahontas; sampled June, 1886.

No. 3. Stephenson, Miller & Co.'s ovens, Pocahontas; sampled January, 1887.

To make a more complete comparison between this Pocahontas coke and other well-known cokes, the following table is given:

	Water.	Volatile matter.	Fixed carbon.	Sulphur.	Ash.
1. Pocahontas coke, average of 3 samples ...	.347	.757	92.550	.597	5.749
2. Birmingham, Alabama district, average of 4 samples...	.157	.803	87.299	1.195	10.545
3. Chattanooga, Tennessee, district, average of 4 samples..	.447	1.101	80.513	1.595	16.344
4. Connellsville coke of Pennsylvania, average of 3 samples....	.060	.427	88.962	.810	9.741

These average analyses show that, so far as chemical purity is concerned, the Pocahontas coke ranks high, being lower in both sulphur and ash and higher in fixed carbon than the cokes from the other well-known districts.

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Pocahontas coal and coke.....Page 152–154

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Pages 3, 4, 5 and 6 of "The Iron Belt" of October, 1891, referred to in the foregoing answer, are in the words and figures following, to wit:

125 *Pocahontas Flat Top Coal Region.*

A description of the development of this enormous field—Interesting statistics and comprehensive data of what is being done.

Growth of the industry in a decade, giving output from year to year—List of the companies doing business in the Flat Top region and the location of their mines—Wages and cost of mining—Increase of land values—The product for the present year will, it is estimated, reach 2,300,000 tons—Brief review of the coke industry of that section—The output of coke for the first half of 1891 will be over 250,000 tons.

The magnificient resources and marvelous development of southwest Virginia has, within past few years, attracted the attention of the whole country.

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In no branch of trade has greater progress been made than in the coal interests of the Pocahontas Flat Top region, and it is the purpose of this article to give the readers of The Iron Belt some idea of their vastness. Ten years ago the coal-fields of Pocahontas were comparatively unk-own, this year the output will, it is estimated by the Pocahontas Coal Company, be 2,3000,000 gross tons, a record almost without a precedent in the annals of industrial progress.

This coal-field, which is practically inexhaustible, embraces large portions of Tazewell and Wise counties, Virginia, and Mercer, McDowell, Wyoming and Raleigh counties, West Virginia, and so great is *their* extent that Andrew S. McCreath, chemist to the geological survey of Pennsylvania, says that if 10,000 tons were mined daily it would only exhaust one acre each day of the Pocahontas Flat Top field.

Divisions of the District.

There are three principal divisions of the region: The Pocahontas district, including the working around Pocahontas; the Bluestone district, including the workings on the Bluestone near Bramwell; and the Elkhorn district, embracing the workings in McDowell county on the northeast side of the Flat Top mountain. The Flat Top Coal Land Association, Mr. E. W. Clark, president, owns most of the land in the region, and their holdings include 10,000 acres in Tazewell county, Va.; 45,000 acres in Mercer county, W. Va.; 55,000 acres in McDowell county, W. Va.; and nearly 100,000
126 acres in Wyoming county, W. Va.; the latter being as yet undeveloped, but gives promise of being very rich. The Crozer Land Company also owns 16,000 acres of fine coal land, and the Crozer, the Powhatan, Houston, Lynchburg, Turkey Gap, and several other coal and coke companies, which have not begun shipment, are lessees of the Crozer Land Company.

Quality of the Coal.

As to the quality of the coal, it can be said that it is the finest, and shows the following analysis: Water, 1.011; volatile matter, 18.812; fixed carbon, 74.256; sulpher, .730; ash, 5.191. In getting out coal for shipment every ton is required to come up to a certain standard, which it is needless to say is high, otherwise it is condemned. That Pocahontas coal is of superior quality has been demonstrated by careful analysis and many severe practical tests. For steam-generating qualities, fusing, and quantity of residu-m it stands at the head. It has been endorsed by the Government of the United States; it is used in the trial trips of our cruisers; it goes to all ports of the world in the ships which coal at New York and Norfolk, and the development of these coal measures constitutes one of the wonders of this *wonders of this* wonderful age and country.

Virginia and West Virginia.

In 1880, when the census was taken, southwest Virginia and *West Virginia* mined 1,885,741 short tons of coal. In 1890, ten

years later, the product of these *States* amounted to 7,046,543 tons, or over one-third of the total output of the ten Southern States mining coal. In these *two States*, the total capital invested in coal production during the last census year was $11,563,566; the total number of employees was 11,507; total wage payments, $4,509,978, and the total expenditure of all kinds was $5,524,204. This is a phenomenal increase, and the end is not yet. The Pocahontas Flat Top coal-fields are just in the beginning of their development, and the next census will show an increase equally as great as that which has characterized the last decade.

Norfolk and Western Railroad.

Just here, in the beginning of this article, it will not be inappropriate to speak of a company, the organization of which was coeval with the beginning of the present era of prosperity in southwest Virginia. The most important factor in all the development of the Pocahontas Flat Top coal-fields is the Norfolk and Western
127 Railroad Company, the "mainspring" of southwest Virginia, to the energy of whose officials is due the rapid progress in the development of this field, and they deserve the greatest commendation and praise for the manner in which they handle the enormous coal tonnage of the Flat Top fields over a single-track road. Ever since the reorganization of this company, it has taken the lead in everything having for its object the upbuilding of southwest Virginia. President F. J. Kimball, and Colonel Charles G. Eddy, its efficient vice-president, are the best friends this section ever had, and their company is accomplishing wonders in its development, and adding enormously to the material prosperity of this vast region.

History of the Development.

The developments in the Flat Top coal-field started in the fall of 1881, but only surface work on the side of the mountain was done. In January, 1882, about twenty miners were landed at the point in Tazewell county, Virginia, where now stands the town of Pocahontas, then a howling wilderness, having taken nine days to make the trip from New York, the greater part of the time having been consumed in making their way across the mountains from Wytheville. A place was cleared away and a shanty was erected, in which the men cooked their meals and had their sleeping apartments. The first work done by these men was the clearing of a passageway up Laurel creek. This creek was so named from the large amount of laurel bush that lined the banks of the stream, and which, in some places, was so dense that it almost excluded daylight. Mr. William T. Moore, an old and respected citizen of Abb's Valley, tells of shooting an enormous bear on Laurel creek one afternoon about sunset, and when he returned next day to secure his game he could not make his way to the spot on account of the denseness of the undergrowth. So much for this digression.

The wet season in the spring of 1882 retarded the progress of the

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work, which was all out of doors, but in March, that year, the first blast was put in the east mine, and on April 1st, Mr. Thomas C. Blair, now a successful capitalist of Roanoke, Va., closed a contract with the Southwest Virginia Improvement Company to run the No. 1 east mine one mile; also the air course and the No. 1 west mine. The work was then pushed with vigor till fall, when it was stopped for a time on account of the inability of the railroad to reach the mines, in consequence of all the coal taken from the mine being dumped in front of the opening.

128 The New River division of the Norfolk and West- railroad was completed in 1883, and the first car-load of the product of the new coal-field was shipped through to Norfolk and distributed among the poor. When the car left Pocahontas it was decorated with branches of laurel, and as it passed through the various towns along the route the people, realizing that the completion of the Norfolk and Western branch road to the coal mines would mark the beginning of a new era in the history of our development, in their enthusiasm, draped the car with bunting and flags, and when it arrived at Norfolk it was one mass of red, white and blue.

When the mines were first opened a shipment of two and three hundred tons per day was considered a great output, but when the big explosion took place in the year 1884, the daily output was many times greater than this. This explosion was beneficial to the new coal-fields, inasmuch as it attracted the attention of the public to it. At that time there were thousands of people in the State who did not know there was such a place as Pocahontas, or had not heard of the wonderful developments going on there.

In the beginning of 1885, the Norfolk and Western Railroad Company built a branch road from Bluestone Junction which tapped the north side of the Flat Top field. The first to enter this side of the field was the firm of John Cooper & Co., and Freeman & Jones, and the first car was shipped from this district on the day of Cleveland's election in 1884. Since the opening of this road the development has been phenomenally rapid.

The Pocahontas Flat Top coal measures are above the water level in veins ranging from five to thirteen feet in thickness, extending through an area estimated to contain not less than three hundred square miles. *Pocahontas* coal is from the *lower* coal measures and is semi-bituminous, containing but eighteen per cent. of volatile matter. The veins dip to the north and west, and the extension of the Ohio division of the Norfolk and Western railroad north to the Ohio river and the road west to the Cumberland mountains, pass through the middle and upper measures, thus opening up coal of a greater volatile matter, bituminous, splint and cannel.

Increase in Land Values.

The increase in the value of land in this region is something amazing, and tells a wonderful story. Before and up to the time the Norfolk and Western Railroad Company built its New River

division to Pocahontas, property was considered worth not
129 more than fifteen to twenty-five cents per acre (that being about the usual price), and it was hard to find purchasers at that figure, but after this road was completed prices began to go up rapidly, till about the year 1885, they ranged from one to three dollars per acre. They have continued to go up since that time until now, when there is comparatively little for sale, and that at from thirty to seventy-five dollars per acre. These lands are worth, in royalties at ten cents per ton, from $800 to $1,200 per acre, according to the thickness of the underlying vein, and the royalties received from every acre of the property so far developed *has* returned over $300 for every dollar invested, or about 30,000 per cent.

Wages and Cost of Mining.

From an article which appeared in *The Iron Trade Review* some time ago, we take the following in reference to cost of mining and wages:

The rates paid for mining in this district are 75 cents per wagon of 90 cubic feet (two tons) for room coal, $1.05 a car for entry coal. As more than the usual proportion of the coal taken out is entry coal, this increases the cost at the present time somewhat above the average. On the basis of forty-five cubic feet to the ton of 2,240 pounds, the price of mining is 37½ cents for the room coal and 52½ cents for entry coal. Breaking through rooms is paid $1.00 per yard and tonnage; turning rooms 50 cents per yard and tonnage. The company lay all roads and post the rooms, the miner having nothing to do but mine and load into the car everything he brings down from the vein. Drivers are paid $1.68; trappers, 58 cents; track-layers, $1.75; men at the head of the tipple, $1.75; men standing props, $2.00; laborers, $1.20 per day. Powder costs the men about five cents a ton of coal mined; tool-sharpening, 50 cents a month. Good miners average four cars a day in the Pocahontas mines. On the narrower seam, on the Bluestone, a miner, with a boy or a common laborer, will average about the same. It is estimated that the average wages of miners per month are $45; some make as high as $120 to $130 per month.

Location of Mines.

The location of the local mines are as follows: Semi-bituminous coal—Pocahontas, Bramwell, Dubring, Mill Creek Junction, Simmons' Junction, Flipping, Goodwill, West Fork, east end tunnel, west end tunnel, Maybeury, Switchback, Ennis, Elkhorn and along the Ohio extension Norfolk & Western railroad. Semi-bituminous
and gas coal—Richlands and along the Clinch Valley exten-
130 sion of the Norfolk & Western railroad between that point and Norton. Bituminous, gas, splint and cannel, along the Ohio extension of the Norfolk & Western, be- Wayne Court-house and Pondmouth, West Virginia.

In the table below is given the acreage and tonnage mined from

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the beginning of operations up to January 1st, 1891, by the companies who are lessees of the Flat Top Coal Land Association:

Companies.	Thickness of vein.	Number acres undermined.			Number of tons.	Tons per acre.		Per cent. per acre.
		Rooms an entries.	Robbed.	Total.		Actual.	Theoretical.	
S. W. Va. Imp. Co	9.0	159.25	321.75	481.	4,242,110	8,819	14,520	.61
John Cooper & Co.	8.0	56.3	60.	116.3	1,078,441	9,273	12,906	.72
Caswell Creek C. & C. Co..	7.7	78.6	8.5	87.	877,593	10,076	12,423	.81
Booth-Bowen C. & C. Co..	6.8	41.3	28.2	69.5	693,279	9.975	10,971	.91
Buckeye C. & C. Co.....	6.5	42.8	5.6	48.4	489,838	10,123	10,487	.96
Goodwill C. & C. Co.....	4.7	29.6	2.5	32.1	228,957	7,133	7,583	.94
Shamokin C. & C. Co. ...	7.5	17.2	.....	17.2	180,030	10.467	12,100	.87
Louisville C. & C. Co	4.8	16.6	2.5	19.1	141,361	7.401	7,744	.93
Norfolk C. & C. Co.....	7.5	11.1	.....	11.1	119,948	10,806	12,100	.89
Elkhorn C. & C. Co.....	7.5	17.2	.....	17.2	178,364	10,370	12,100	.86

The output of the Pocahontas Flat Top coal-field from year to year, given in tons of 2,240 pounds, is as follows: 1883, 99,871; 1884, 283,252; 1885, 577,906; 1886, 759,367; 1887, 1,025,880; 1888, 1,376,010; 1889, 1,592,485; 1890, 1,807,716; 1891 (to date, Oct. 10), 1,628,927.

Output by Companies.

Following is a table showing the output of the field by companies from 1883, when the Southwest Virginia Improvement Company made its first shipment, up to October 1st, 1891, as shown by the books of the Flat Top Coal Land Association and the Pocahontas Coal Company:

PAGES BOUND VERTICALLY

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131 Companies.	1883.	1884.	1885.	1886.	1887.	1888.	1889.	1890.	1891.	Total.
S. W. Virginia Improvement Co.	60,828	172,466	370,705	473,570	550,718	705,333	601,409	512,791	420,317	3,868,137
John Cooper & Co		2,368	58,214	108,615	165,845	186,924	184,071	192,033	115,877	1,013,947
Caswell Creek Coal and Coke Co		417	56,868	94,017	121,684	162,085	154,321	169,789	154,039	913,221
Booth-Bowen Coal and Coke Co			33,570	69,435	110,569	137,554	128,460	129,026	115,183	723,797
Buckeye Coal and Coke Co				20,397	68,316	100,143	106,966	120,017	102,736	518,575
Goodwill Coal and Coke Co					9,008	52,333	63,934	59,781	59,148	244,204
Elkhorn Coal and Coke Co						9,103	49,754	68,472	58,778	186,807
Shamokin Coal and Coke Co						8,730	50,286	66,730	60,571	186,317
Louisville Coal and Coke Co						4,613	47,159	58,444	60,955	171,171
Norfolk Coal and Coke Co							20,043	62,456	59,439	141,938
Turkey Gap Coal and Coke Co						10,040	62,173	78,694	70,525	221,432
Crozer Coal and Coke Co						2,358	61,588	119,575	125,962	309,483
Houston Coal and Coke Co						3,181	54,854	69,346	60,657	188,031
Powhatan Coal and Coke Co							33,569	68,457	65,523	167,549
Lick Branch Coal and Coke Co								5,673	53,492	59,165
Richland Coal and Coke Co									40,000	40,000
Lynchburg Coal and Coke Co									15,309	15,309
Uplands Coal and Coke Co									432	432
Coaldale Coke and Coal Co								17,437	66,241	83,678
Grand total shipments from 1883 to October 1st, 1891										9,053,008

132 *List of Companies.*

The following is a list of mining corporations doing business in the Flat Top region, who mine and handle the celebrated Pocahontas coal, together with the officers of the companies, and other interesting information that is not generally known to the public:

Pocahontas Company.

The Pocahontas Coal Company, organized January 1st, 1895. Officers: William C. Bullitt, president; D. H. Matson, secretary and treasurer; H. N. Claxton, general agent; John Twohy, superintendent piers, Norfolk; general office, Roanoke, Va.; branch office, Norfolk, Va.; shipping office, Bluefield, W. Va. This company, who make all sales for the entire output of the region, assuming all liabilities, shipped during the year 1890 1,807,716 tons, and has shipped during the present year to date (October 10th), 1,628,927 tons. "From present indications," says Mr. Matson, secretary of the company, "we estimate that for the year 1891 we will ship 2,300,000 tons."

The Pocahontas Coal Company make a uniform price for all coal mined, furnishes inspectors for each tipple where the coal is loaded, thus guaranteeing to purchasers coal free from bone, slate and other impurities. This company pays the operators by check the fifteenth day of each month, thus securing them against losses by reason of bad debts, shortage and freight rates. The company employs twenty-six subinspectors, who are under the supervision of Mr. W. D. Milne, chief inspector. Mr. Milne's headquarters are at Bramwell, and he makes a tour of inspection of each tipple at least once a week.

Southwest Virginia Improvement Co.

This company was the first to secure a lease from the Flat Top Association and begin operations. It was organized in 1882, and the following officers are at the head of affairs: President, H. Wickham; secretary and treasurer, E. J. Collins; general superintendent, C. E. F. Burnley. The general and shipping offices of the company are at Pocahontas, and the mines, three in number—No. 1 East, No. 1 West and the Baby—are located about one-half mile from the town of Pocahontas, on Laurel Creek. The company has in its employ at present about 1,400 men, but when the coke trade is brisk this number is augmented by about 2,000 more. They have completed,
or nearly so, 650 first-class coke ovens. They use steam power
133 in the mines and on the ovens, having in all eight locomotives, five of which are in the mines. The company is building a new improved tipple, which will be five feet in the clear higher than the two now used. The lease of the company calls for 3,808 acres of land, 3,789 of which *is* coal and nineteen barren. Their mines and coke ovens are shown in the accompanying cuts.

John Cooper & Co.

This firm has just been reorganized, and will shortly begin operations under the name of the Mill Creek Coal and Coke Company, with the following officers: President, William Beury; secretary, T. H. Cooper; general manager, John Cooper. The firm of John Cooper & Co. began operations in 1883, having secured a lease of 1,042 acres from the Flat Top Association, 918 of which are coal and 123 barren. The general office of the company is at Coopers, W. Va., and the shipping office is at Mill Creek. The mines of the company are located one and one-half miles from Mill Creek, near East End tunnel. They have four openings and three tipples, and their coal is handled on the outside by two eight-ton locomotives. They have 150 coke ovens, and employ 350 men, 200 of whom are in the mines. The company has just completed one mile of tramway from East Fork mine to the coke ovens. Air is furnished by a sixteen-foot fan, the next largest in the field, and their Worthington steamp ump is a jewel, capable of pumping up 100,000 gallons per minute.

Caswell Creek Coal and Coke Co.

The Caswell Creek Coal and Coke Company, formerly Freeman and Jones, was organized in March, 1889. The present officers are: President, Jenkin Jones; vice-president, C. M. Kyle; secretary, treasurer and superintendent, John Freeman. General office at Freeman's W. Va.; shipping office, Bramwell, W. Va. The company has employed 406 men, 325 of whom are inside the mines, the remainder being occupied at the coke ovens and other outside labor. Their mines are located about one-half mile from Freeman's, on Simmons creek. They have 146 ovens, fifteen of which are patent, fifteen feet long by seven feet wide. The mines have two openings, and the coal is loaded at two tipples. They are now driving an entry through to Elkhorn, which will open up a large block of coal of fine quality, and will enable them to double their shipments. On this entry a ten-ton locomotive will be used. The original lease of Freeman & Jones, taken out in 1884, calls for 934 acres, 709 of which are coal and 225 barren. Their lease has now been increased to 1,400 acres.

134 Booth-Bowen Coal and Coke Co.

This company was organized in February, 1889. (Began operations in 1884 by William Booth.) Present officers: William Booth, president; J. P. Bowen, vice-president; James Booth, treasurer and general manager, and Harry Bowen, secretary. The mines are located about two miles from Freeman's and they employ 250 men, 200 of whom are inside the mines. General office of the company, Freeman's W. Va.; shipping office, Bramwell, W. Va. They have recently constructed a tramway from the present tipple to No. 2 drift. William Booth leased from the Flat Top people, in 1884, 591 acres, 557 of which are coal and thirty-three barren. The company has a large and well-equipped store at Freeman's. The residences

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of Messrs. Booth and Bowen are beautifully situated on an eminence overlooking the village of Simmons.

Buckeye Coal and Coke Company.

This company was started in 1888, being a reorganization of the firm of Stevenson, Mullen & Co., who began operations in 1885. Their lease calls for 737 acres, 649 of which are coal and eighty-seven barren. The officers of the Buckeye Company are: President, William D. Mullen; vice-president and superintendent of mines, John D. Hewitt; secretary, James B. Stevenson; treasurer, B. Moore. Their general office is at Freeman's, W. Va., and the shipping office at Bramwell. The mines of the company are located on the East fork of Simmons creek, about one and three-quarter miles from Freeman's. They have 100 first-class ovens, and hav- oom enough for seventy-five more if needed. This company built the first ten ovens that were built on Simmons creek. They employ 270 men. Of this number 214 are inside the mines, fifty six outside. They have eighty first-class tenements, and the residences of Messrs. B. Moore, the treasurer, and W. S. Corvell, shipping and time clerk, are models of beauty, being situated upon a high elevation which commands an excellent view of the surrounding country.

Goodwill Coal and Coke Company.

The Goodwill Coal and Coke Company was organized in 1887. Officers: President, Robert Goodwill; vice-president, A. G. Goodwill; secretary, treasurer and general manager, Philip Goodwill. The lease of this company calls for 778 acres, 518 of which are coal and 260 barren. The mines of the company are located one-quarter of a mile from Goodwill, on East fork Flipping creek.
135 They have three openings and two tipples, and employ about 150 men, 125 of whom are inside the mines. They have already erected fifty ovens. Thirty double tenements are required to supply the miners with homes. The general and shipping offices of the company are each at Goodwill, W. Va.

Louisville Coal and Coke Company.

The Louisville Coal and Coke Company, organized September, 1888, is located at Goodwill, W. Va., shipping office also at that point. Officers: R. T. Watts, president; Justus Collins, vice-president, secretary and treasurer. The company is equipped with a fifty-horse-power boiler, coal-crusher, conveyor and elevator, a sixteen-foot Brazil fan, two tipples, employs 200 men and has a capacity of 10,000 tons of coal monthly. Their lease is for 483 acres, 405 of which are coal and 78 barren. Under the management of Mr. Collins, the company has been successful, and the State inspector of mines stated recently that their mine was one of the finest ventilated mines in the State. They have seventy-five coke ovens, a large number of tenement-houses, commodious stores and offices, and everything in and about the mines is in first-class condition. No miner has ever been killed or seriously injured in their mines.

Houston Coal and Coke Company.

The Houston Coal and Coke Company, organized August, 1887. Officers: R. J. Houston, president; T. E. Houston, secretary, treasurer and general manager. This company has a lease of 1,169 acres of coal land in McDowell county, from the Crozer Land Company, and their mines are located in the Elkhorn district. They employ 300 men, 150 of whom are in the mines. They have 100 ovens completed, and will double the number. The general and shipping office of the company is at Elkhorn, W. Va.

Norfolk Coal and Coke Company.

Norfolk Coal and Coke Company (owners of the Lick Branch colliery), organized 1888; shipping office, Elkhorn, W. Va.; post-office, Maybeury, W. Va. Officers: Stuart M. Buck, president and general manager; Joseph L. Clarke, secretary and treasurer; E. S. Hutchinson, vice-president and manager Lick Branch colliery. This company has four leases of 4,000 acres of coal land as follows: Norfolk colliery, Lick Branch colliery, both in operation, and the Angle and Delta collieries under construction. The Norfolk colliery
136 began shipments in May, 1889. The Lick Branch began in September, 1890. The two collieries employ about 300 men, miners and cokemen.

Coaldale Coal and Coke Company.

The above company, which is operated by the Mill Creek Coal and Coke Company, was organized in June, 1889. They work 225 men, 125 of whom are inside the mines. Their mines are located about one-half mile from West End tunnel. They have fifty-three patent coke ovens, and are building fifty beehive ovens. They have in use an eight-ton locomotive, and their mine is ventilated with a 20 foot fan, the next largest in the district. The mines are also equipped with elevators, conveyors, rope haulage, etc.

Shamokin Coal and Coke Company.

The company was organized in 1887. Officers: John Mullin, president; John Cooper, manager; John Hunter, superintendent. General and shipping office, Maybeury, W. Va. The company leased from the Flat Top Association 658 acres, 477 of which are coal, and 180 barren. This lease has been extended to 1,300 acres. The mines are located on the South fork Elkhorn at Shamokin. One hundred and eighty men are employed, 150 of whom are inside the mines. They have one hundred ovens built and will build one hundred more in the spring. The Shamokin people are progressive, and will make of their plant one of the finest in the district. They have recently spent several thousand dollars in new tenements for their miners.

Elkhorn Coal and Coke Co.

The Elkhorn Company was organized in February, 1887. Officers: E. Barlow, president; A. D. Robertson, secretary and treasurer; A.

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Barlow, general manager. General and shipping office, Maybeury, W. Va. They have leased from the Flat Top Association 670 acres of land, 460 coal, 210 barren. The mines are about one-half mile from Maybeury, on South fork — Elkhorn. They have two openings and one tipple, and employ 250 men, 150 being in the mines. They have one hundred ovens, and will build one hundred more. The company has recently constructed a number of new tenements. The Elkhorn was the first company to secure a lease in the Elkhorn district, and the first to ship coal and coke.

137 Turkey Gap Coal and Coke Co.

This company was organized in December, 1887. Present officers: William H. McQuail, president and general manager; F. P. Harman, secretary and treasurer. The company has a lease of 908 acres of fine coal land from the Crozer Land Company. The general and shipping office is at Ennis, W. Va. The mines are located about one-fourth mile from Ennis, on South fork — Elkhorn, and they employ underground 225 men, and 175 men at the ovens and other outside labor. They have 142 coke ovens completed, and are building fifty-two more. It is the intention of the company to make the plant 250 ovens. The company has 130 tenements, having just completed thirty blocks of houses. The mines are ventilated by a 16-foot Allison fan. The storehouse of the company is complete in every respect, being heated with steam and equipped with improved elevators. It is four stories high, 80 x 45 feet, and has in it a stock of goods valued at $23,000. President McQuail is an enthusiastic worker, and is making of his colliery a plant of which he may be well proud.

Powhatan Coal and Coke Co.

This company was organized in 1888. Officers: J. J. Tierney, president; A. D. Wolfe, secretary and treasurer; L. E. Tierney, superintendent; James Heatherman, mine boss. General and shipping office, Powhatan, W. Va. Their mines are on the South fork of Elkhorn, at Powhatan, and they employ 150 men, 130 of whom are in the mines. They have 125 ovens. Their tipple is one of the best, and makes three kinds of coal. Superintendent Tierney is one of the best coal men in the entire Flat Top region, and if he doesn't place the Powhatan Company in the front rank nobody can.

Crozer Coal and Coke Co.

The Crozer Company was organized in 1887, having obtained a 3,000-acre lease from the Crozer Land Company. The officers of the company now are: Samuel A. Crozer, president; Edward Crozer, treasurer; Francis E. Weston, secretary; William J. Harris, general manager. The general and shipping office is Elkhorn, W. Va. They employ 450 men. The mines of the company are on the South fork of Elkhorn, and have two openings and one tipple. They have 250 first-class coke ovens completed, and most

of their coal is shipped to Roanoke to supply the furnaces of the Crozer Steel and Iron Company. Their plant is the most
138 complete in the Elkhorn district, and is the second largest in operation in the entire field, the Southwest Virginia Improvement Company ranking first. Mr. William J. Harris, who recently succeeded Mr. Tierney as general manager, is a gentleman thoroughly familiar with coal and coke in all its details, and every day proves his fitness for the position he occupies.

Algoma Coal and Coke Co.

The Algoma Coal and Coke Co., organized March, 1890. Officers: L. C. Hansbrough, president; F. H. Chalmers, secretary and treasurer; William H. Thomas, general manager. This company, whose general and shipping office is Algoma, McDowell county, W. Va., has leased from the Flat Top Coal Land Association 1,800 acres of coal land on the North fork of the Elkhorn. The mines of the company have been opened and they have a seam of coal six feet six inches high, a coal of most excellent quality and free from any impurities. They have an excellent tipple and slack bin erected, and are fitting up the *up* same with improved coal-handling machinery. Owing to the inability of the coal company to get their tracks they have been compelled to close down their operations, but grading has been begun and the railroad company are pushing their work and expect to have the tracks ready by the 20th of October. They have fifty ovens and will be making coke in a short time.

Virginia Gas and Coal Co.

The Virginia Gas Coal Company, organized December, 1889. Officers: J. H. Dingee, president; J. Walter White, secretary and treasurer; Robert Fleming, superintendent. The company owns 5,000 acres of coal land in Wise and Tazewell counties, Va., and will shortly open up and operate on a large scale. The output at present is only about six railroad cars per day, but this will be doubled in a short time. The company has erected twenty-four nice tenement-houses, and are now making many improvements in the way of tipples, etc., which will largely increase the output.

Kentucky Coal and Coke Co.

Kentucky Coal and Coke Company, organized November, 1890. Officers: John Blades, president; Thomas J. Dorham, secretary and treasurer; S. S. Smith, vice-president and general manager. The mines of the company are on Big Tom creek, in Wise county, Va., where they leased 500 acres of coal land. Location of general and shipping office, Guest Station, Wise county, Va.

139 Richlands Coal Co.

The Richlands Coal Company, organized December, 1890. Officers: Samuel P. Griffits, president; Marcellus Coxe, secretary and treasurer. The general office of the company is at Richlands, Va., and the mines of the company are on Big creek, about four miles

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north of Richlands. This company began shipments of coal in August this year, and have shipped about 40,000 tons of coal to date.

Coking Operations.

Brief account of the coke trade in the Flat Top region.

Nearly all the companies named above are engaged in the manufacture of coke. The first ovens for cooking Flat Top coal were constructed in 1883 at Pocahontas by the Southwest Virginia Improvement Company, and the development of the industry has been amazingly rapid and almost as phenomenal as that of the Pocahontas coal measures. This coke is of the finest quality, both as to analysis and structure, as the following analysis shows: Water, .347; volatile matter, .757; fixed carbon, 92.550; sulphur, .597; ash, 5.749.

In 1883 there were only 200 ovens in the Flat Top region. On January 1st, 1890, there were 1,765 in active operation, while 564 were being constructed and 520 were in contemplation. Now, there are about 3,326 ovens in the field, built and under construction. At this rate the Pocahontas field will soon overtake the Connellsville field in the number of ovens as well as the quality of the product. After being in operation over thirty years, the Connellsville region has only 11,866 ovens, or a little over two-thirds the number in the Pocahontas field, which has been in operation only eight years.

The number of ovens completed, and those under construction at the beginning of the present year, together with those contemplated, is given in the following table. All of these will probably be completed by the end of the present year:

140	Completed.	Under construction.	Contempl'd.
Southwest Virginia Imp. Co	400	250	
John Cooper & Co	150		
Caswell Creek C'l & Coke Co	140		70
Booth-Bowen Coal & Coke Co	91		
Buckeye Coal & Coke Co	100		
Goodwill Coal & Coke *Coke* Co	50		
Louisville " " " "	50	25	
Elkhorn Coal & Coke Co	100		
Shamokin " " "	100		
Norfolk " " "	100	72	
Turkey Gap " "	100	15	50
Crozer " " "	216	16	100
Houston " " "	100		
Coaldale " " "	17	36	
Powhatan " " "	100		
Lick Branch Colliery	70		
Lynchburg Coal & Coke Co		100	
Keystone " " "			100
Gilliam " " "			100
Algoma " " "			100
Totals	1,884	514	520

The output from year to year, given in tons, is as follows: 1883, 19,805; 1884, 52,530; 1885, 50,194; 1886, 60,436; 1887, 150,708; 1888, 200,317; 1889, 310,504; 1890, 433,517; 1891 (first half), about 250,000 tons. Owing to the depression of the iron trade during the present year, the shipments for 1891 show no very great increase over 1890.

The following table shows the number of cars of coke shipped out of the Pocahontas region and their destination for the year 1890, as compared with 1889:

Destination.	1889. Cars.	1890. Cars.
To points on Norfolk and Western railroad..	9,001	9,092
" " " Shenandoah Valley railroad	494	2,426
" " " other railways of Virginia	13	19
" " north of Hagerstown & Shenandoah Jct	196	13
" " south of Bristol	6,127	9,143
" " in North and South Carolina	12	133
" East St. Louis, Ill	65	58
" East Carondelet, Ill	54	.....
" Louisville, Ky	21	1
Totals	15,983	20,885
	Tons.	Tons.
Representing a total tonnage of	310,504	433,527

141 Superintendent Porter, of the Census Bureau, speaking of Pocahontas coke, says: "This coke has been the salvation of southern iron furnaces. It has proved the best iron-making coke on the market, being superior to Connellsville, and is wonderfully efficient." This coke finds a ready market, not only at home throughout Virginia, but, as shown above, it is shipped in large quantities to North Carolina, Georgia, Alabama, Tennessee, Maryland and other points in the South, and west from New Orleans to Omaha, and from St. Louis to the Atlantic, and when the Ohio extension of the Norfolk & Western railroad is completed, it will open up to it a still wider field, as the haul will not be so great to the great iron-making centre of *of* Ohio as the Connellsville region.

The Hull Coal and Coke Company, of this city are the shippers of the entire output of the Pocahontas fields. Every ton of coke manufactured there has to pass through their hands. They have a branch office at Louisville, Ky., through which all the western trade is handled. The company's shipping office is at Bluefield, West Virginia.

Thanks.

In closing this account, the Iron Belt desires to express thanks to the officers of the Pocahontas Coal Company, the Hull Coke Company, and to Mr. W. D. Milne, chief inspector of the tipples of the Flat Top region, for valuable assistance rendered in securing the data for this article. Mr. Milne accompanied our representative

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down the Bluestone district and extended many courtesies that are appreciated.

Pages 1 to 17 inclusive of "The great Pocahontas Flat Top Coal Field Industrial edition of the Daily Telegraph" referred to in the foregoing answer, are in the words and figures following, to wit:

(This exhibit is attached to the printed record as a separate pamphlet.)

(Exhibit "Clippings," referred to in the foregoing answer, was never filed, as we are informed by defendant's counsel.)

The Exhibit "Letter-heads," referred to in the foregoing answer, *are* in the words and figures following, to wit:

142 Wm. Booth, president, Roanoke, Va.; A. D. Rice, sec'y and treas., Roanoke, Va.; W. S. Cowell, vice-pres. and gen'l manager, Worth P. O., W. Va.

The Roanoke Coal and Coke Company, miners and manufacturers of Pocahontas coal and coke.

Freight, express, and telegraph office, Elkhorn, W. Va.; post-office, Worth, McDowell Co., W. Va.

COWELL, W. VA., *Jan'y 10th*, 1896.

T. W. Gilliam, president; J. R. Gilliam, sec. and treas.; Jas. Johnstone, gen'l manager.

Manager's office of the Arlington Coal and Coke Co., shippers of celebrated Pocahontas coal.

Freight office, }
Express " } Elkhorn, W. Va.
Telegraph " }

McDOWELL, W. VA., 7, 16, 1894.

R. C. Luther, president; George C. Clausen, V. pres. and treas.; H. C. Zacharias, gen. mgr.

Peerless Coal and Coke Company, producer of the Pocahontas Flat Top coal and coke and dealer in general merchandise.

CLAUSEN, W. VA., *Sept. 15th*, 1894.

143 Jenkin Jones, pres't; C. M. Kyle, vice-pres't; George Freeman, sec. & treas.

Caswell Creek Coal & Coke Company,

(Vignette.)

Successors to Freeman & Jones, operators in the famous Pocahontas coal-field.

R. H. T. Adams, president; L. E. Tierney, V. pres't & gen'l man'r; A. W. Talley, sec. & treas.

Eureka Coal & Coke Co., miners & shippers of the celebrated Pocahontas coal and coke.

Mines, near Eckman, McDowell Co., W. Va.
Freight & express office, Eckman, W. Va.

POWHATAN, W. VA., *July* 1, 1894.

I. A. Welch, president; G. F. Lucado, vice-president; W. R. Graham, gen. mgr. & treas.

Shawnee Coal and Coke Co., producers of the Pocahontas Flat Top coal and coke.

ECKMAN, W. VA., *Aug. 6th*, 1894.

Justis Collins, pres't, Goodwill, W. Va.; C. V. Winf—, vice-pres't, Lync—rg, Va.; Hugh Johnston, gen. mgr. and treas'r.

Greenbrier Coal and Coke Company, producers celebrated Pocahontas coal and coke.

McDOWELL, W. VA., *May* 25, 1894.

144 T. L. Henritze, president & general manager; R. B. Bernheim, secretary & tre-s'r.

The Tidewater Coal and Coke Company, miners and shippers of celebrated Pocahontas Flat Top coal, manufacturers of coke, and dealers in general merchandise.

Shipping address: Vivian, W. Va., Ohio ext. N. & W. R. R.

VIVIAN, McDOWELL CO., W. VA., *May* 11, 1894.

—— ——, president; —— ——, —e-president; B. F. Keller, sec'y & treas.; T. T. Lineaweaver, supt.

McDowell Coal & Coke Co., miners & shippers of celebrated Pocahontas Flat Top coal.

(Vignette.)

Manufacturers of coke.

McDOWELL, W. VA., 8, 14, 1894.

All contracts are contingent upon strikes, accidents or delays beyond our control.

Worth Kilpatrick, president; Lloyd Johnston, vice-president; J. A. Armstrong, sec'y and treas.; C. Botsford, gen. manager.

Indian Ridge Coal and Coke Company, miners and manufacturers of Pocahontas coal and coke.

Works: Indian Ridge, McDowell county, West Va.

CONNELLSVILLE, PA., *Feb.* 20, 1897.

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145 The above are fastened together and endorsed: Castner & Curran *v.* Coffman. "Exhibit Letter-heads" with Coffman's answer. Circuit court U. S., dist. W. Va. Filed in open court this 5 day of May, 1897. L. B. Dellicker, clerk.

Exhibit "Charter," referred to in the foregoing answer, is in the words and figures following, to wit:

Certificate of Incorporation.

(Vignette. Seal of State.)

I, W. E. Chilton, secretary of the State of West Virginia, hereby certify that an agreement, duly acknowledged and accompanied by the proper affidavits, has been this day delivered to me, which agreement is in the words and figures following:

The undersigned agree to become a corporation by the name of Pocahontas Company, for the purpose of mining coal, manufacturing coke and buying, selling and generally dealing in coal and coke on commission or otherwise, with the right to purchase, lease and otherwise acquire lands, mining rights and other interests in lands and other property useful for the purpose aforesaid.

Which corporation shall keep its principal office or place of business at Bluefield, in the county of Mercer and State of West Virginia, and is to expire on the first day of March, 1945; and for the purpose of forming the said corporation we have subscribed the sum of five thousand dollars to the capital thereof, and have paid in on said subscription the sum of five hundred dollars and desire the privilege of increasing the said capital, by the sale of additional shares from time to time, to five million dollars in all.

The capital so subscribed is divided into five hundred shares of ten dollars each, which are held by the undersigned, respectively as follows, that is to say:

Names.	Residence.	No. of shares.
By Wm. M. Barnum	Scarsdale, New York	Four hundred.
" Julius F. Workum	New York city, N. Y.	Twenty.
" Philip G. Bartlett	New York city, N. Y.	Twenty.
" John J. Treacy	Jersey City, N. J.	Twenty.
" Samuel F. Jarvis, Jr.	New York city, N. Y.	Forty.

146 And the capital to be hereafter sold is to be divided into shares of the like amount.

Given under our hands and seals, this eighth day of March, A. D., 1895.

WM. M. BARNUM.	[SEAL.]
JULIUS F. WORKUM.	[SEAL.]
PHILIP G. BARTLETT.	[SEAL.]
JOHN J. TREACY.	[SEAL.]
SAMUEL F. JARVIS, JR.	[SEAL.]

Wherefore, the corporators named in the said agreement, and who have signed the same, and their successors and assigns, are hereby

declared to be from this date, until the first day of March, nineteen hundred and forty-five, a corporation by the name and for the purpose set forth in said agreement.

Given under my hand and the great seal of the said State, at the city of Charleston, this twelfth day of March, eighteen hundred and ninety-five.

W. E. CHILTON,
Secretary of State.

[G. S.]

STATE OF WEST VIRGINIA:

OFFICE OF SECRETARY OF STATE.

I, Wm. M. O. Dawson, secretary of state of the State of West Virginia, hereby certify that the foregoing and annexed writing is a true and correct copy of the certificate of incorporation of the Pocahontas Company, a corporation created, formed and organized under the laws of this State, as appears from the record of corporations in my said office.

Great Seal State of W. Va.

Given under my hand and the great seal of the said State, at the city of Charleston, this twenty-seventh day of April, 1897.

WM. M. O. DAWSON,
Secretary of State.

(Endorsed:) Castner & Curran *vs.* W. H. Coffman. Exhibit "Charter" with answer of ——. Circuit court U. S., dist. W. Va. Filed in open court this 5 day of May, 1897. L. B. Dellicker, clerk.

147 Exhibit "C. & C.," referred to in the foregoing answer, is in the words and figures following, to wit:

328 Chestnut St., Philada., Pa.
70 Kilby St., Boston, Mass.
Terry building, Roanoke, Va.
Board of Trade building, Columbus, Ohio.
1 Broadway, New York.
36 Main St., Norfolk, Va.
Old Colony building, Chicago, Ill.
Neave building, Cincinnati, Ohio.
4 Fenchurch Ave., London, England.

Castner and Curran, general agents Pocahontas coal.

(Vignett-.)

PHILADELPHIA, *April 30th*, 1896.

W. H. Coffman, Esq., Bluefield, W. Va.

DEAR SIR: Your favor of — at hand. We are informed you are offering to sell Pocahontas coal, and we would call your attention to the fact that we have patented this name, and cannot allow it to be used by any other party. Will, therefore, be obliged to insist upon your discontinuing the use of this name hereafter.

Yours truly, CASTNER & CURRAN.

(Endorsed:) Exhibit, with Coffman's answer, "C. & C." Circuit court U. S., dist. West Va. Filed in open court this 5 day of May, 1897. L. B. Dellicker, clerk.

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Exhibit "Douglass," referred to in the foregoing answer, is in the words and figures following, to wit:

Telephone No. 3625.

Law offices of J. Walter Douglass, patents and patent causes, Philadelphia, 914 Walnut St.

Legal department: Washington, 615 Seventh St.

PHILADELPHIA, *November 13th*, 1896.

Pocahontas Coke & Coal Company, by Wm. H. Coffman Coke Company, Bluefield, W. Va.

148 GENTLEMEN: Mess. Castner & Curran of this city, the legal owners of the trade-mark "Pocahontas," registered September 29th, 1885, have placed in my possession a postal card issued by your alleged company, containing the word "Pocahontas" in connection with coal, which is a deliberate and wilful infringement upon the trade-mark rights of my clients. You are hereby notified forthwith to desist from the use of said word and signify that desire or intention by a written communication to that effect, addressed to me within ten days from the date hereof, or I shall proceed against you by legal process in the United States court for an injunction to restrain this deliberate or wilful infringement of the rights of my clients under their said registered trade-mark. If you desire to avoid litigation, you will comply with the within request to do so amicably, or summary measures will be taken and the damages which my clients have sustained by reason of your unlawful acts in the premises will be assessed against you in event of a litigation.

Awaiting your prompt reply hereto, I am,

Yours very truly, J. WALTER DOUGLASS,
Att'y for Castner & Curran.

(Endorsed:) Exhibits with Coffman's answer "Douglass." Circuit court U. S., dist. W. Va. Filed in open court this 5 day of May, 1897. L. B. Dellicker, clerk.

Exhibit C. & C. No. 2 referred to in the foregoing answer is in the words and figures following, to wit:

328 Chestnut St., Philada., Pa.
70 Kilby St., Boston, Mass.
Terry building, Roanoke, Va.
Board of Trade building, Columbus, Ohio.
7 Broadway, New York.
36 Main St., Norfolk, Va.
Old Colony building, Chicago, Ill.
Neave building, Cincinnati, Ohio.
4 Fenchurch Ave., London, England.

Castner and Curran, general agents, Pocahontas coal.

(Vignett-.)

PHILADELPHIA, *Nov. 6th*, 1896.

Pocahontas Coke & Coal Co., Bluefield, W. Va.

149 DEAR SIR: Your favor of — at hand. We are informed that you are offering coal to the public under the name of

"Pocahontas" in violation of our registered trade-mark of September 29th, 1885, of the word "Pocahontas" for coals. You are hereby notified to forthwith cease such unlawful use of said word for coals or a bill in equity will be filed against you to enforce you to respect our legally protected rights under the said trade-mark. We await an early reply hereto in order to afford you an opportunity to apprise us whether you will peaceably cease said infringement without legal process in the matter.

Yours truly, CASTNER & CURRAN.

(Endorsed:) Exhibit with Coffman's answer C. & C. No. 2. Castner & Curran *vs.* W. H. Coffman. 3 exhibits with Coffman's answer. Circuit court U. S., dist. W. Va. Filed in open court this 5 day of May, 1897. L. B. Dellicker, clerk.

The advertisements referred to in said answer, taken from "The Coal Trade Journal" of April 14, 1897, are in the words and figures following, to wit:

On page II, first leaf.

S. Castner, Jr. H. B. Curran.

(Vignette.)

Castner & Curran, general sales agents for the celebrated Pocahontas bituminous coal, the best steam coal mined.

328 Chestnut street, Philadelphia.
70 Kilby street, Boston, Mass.
1 Broadway, New York.
36 Main street, Norfolk, Va.
Terry building, Roanoke, Va.
Old Colony building, Chicago, Ill.
Board of Trade building, Columbus, Ohio.
4 Fenchurch avenue, London, England.
Neave building, Cincinnati, Ohio.

Agencies in Europe, South America, and the West Indies.

150 On yellow leaf.

Two hundred thousand dollars won by the use of Pocahontas coal.

An indisputable proof of the superiority of Pocahontas coal is shown by the fact that the Wm. Cramp & Sons Ship and Engine Building Company never use any other fuel in testing ships built by them for the Government, and as a consequence they have just earned a bonus of two hundred thousand dollars on the battleship "Iowa" which exceeded her contract speed, making an average run of 17.41 knots per hour.

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Castner & Curran, general agents for the Pocahontas smokeless semi-bituminous coal; main office, 328 Chestnut street, Philadelphia, Pa.

Branch offices.

No. 1 Broadway, New York. 70 Kilby street, Boston, Mass.
Progress building, Norfolk, Va. Terry building, Roanoke, Va.
Old Colony building, Chicago, Ill. Neave building, Cincinnati, Ohio.
4 Fenchurch avenue, London, England.

The said "The Coal Trade Journal" containing the above advertisements is endorsed: Circuit court U. S., dist. W. Va. Filed in open court this 5 day of May, 1897. L. B. Dellicker, clerk.

Exhibit "Analysis" referred to in the foregoing answer is in the words and figures following, to wit:

151	Water.	Vol't'le matter.	Fixed carbon.	Ash.	Sulph.
S. W. Va. Improvement Co	1.54	21.25	72.08	6.02	.385
	1.34	20.76	72.12	5.78	.281
	.51	19.45	72.60	7.44	.261
	.83	20.49	72.27	6.41	.276
Browning	.68	21.35	73.46	4.51	.450
	.58	20.48	70.93	8.01	.498
Mill Creek	.63	20.91	72.20	6.26	.474
Mill Creek	.74	19.08	71.33	8.85	.582
.68	.68	19.50	74.77	5.05	.546
	.58	20.24	74.51	4.67	.577
	.67	19.61	73.54	6.19	.568
Caswell Creek	.66	19.61	72.27	7.46	.455
	.67	18.05	74.69	6.59	.418
	.62	21.32	71.83	6.23	.440
	.65	19.66	72.93	6.76	.438
Booth-Bowen	.44	19.95	71.92	7.69	.380
	.60	19.77	74.35	5.28	.362
	.54	19.86	74.61	4.99	.344
	.53	19.86	73.63	5.99	.362
Buckeye C. & C. Co	.63	19.42	73.23	6.72	.311
	.80	18.54	73.31	7.35	.321
	.49	18.32	74.86	6.33	.299
	.64	18.76	73.80	6.80	.310
Goodwill	.70	18.30	74.72	6.28	.452
	.51	18.71	73.77	7.01	.415
	.66	18.15	75.20	5.99	.437
	.62	18.39	74.56	6.43	.435
Louisville	.50	18.65	75.50	5.35	.313
	.72	18.51	76.01	4.76	.293
	.70	18.26	74.94	6.10	.308
	.64	18.47	75.48	5.40	.305

Bottom line for each mine is the average.

6493

	Water.	Vol't'le matter.	Fixed carbon.	Ash.	Sulph.
Couldale	.62	19.32	75.47	4.59	.498
	.50	20.71	74.83	3.96	.528
	.46	18.84	75.49	5.21	.501
	.53	19.62	75.26	4.59	.509
Elkhorn	.85	20.11	75.75	3.29	.303
	.37	18.62	77.16	3.83	.301
	.78	19.36	76.08	3.77	.289
	.67	19.36	76.33	3.64	.298
Shamokin	.68	18.87	77.22	3.23	.271
	.57	18.24	77.24	3.95	.265
	.50	19.96	74.96	4.58	.248
	.58	19.02	76.47	3.92	.261
Norfolk	.69	21.16	73.30	4.85	.337
	.46	20.60	74.15	4.79	.358
	.80	20.95	71.96	6.29	.325
	.65	20.90	73.14	5.31	.327
Angle	.40	20.57	73.72	5.25	.347
	.70	20.56	74.03	4.71	.357
	.72	21.34	73.84	4.10	.374
	.63	20.82	73.86	4.69	.357
Lick Branch, No. 1	Lick	Branch,	No. 1.		
	.74	20.97	74.16	4.13	.249
152 Lick Branch, No. 2	.68	21.04	73.63	4.65	.271
	.68	20.34	73.62	5.36	.256
	.68	20.69	73.62	5.20	.263
Turkey Gap	.74	19.38	70.29	9.59	.487
	.73	19.49	71.02	8.76	.501
	.64	19.38	73.72	6.26	.421
	.70	19.42	71.68	8.20	.470
Crozer, No. 1	.76	18.84	73.81	6.59	.572
	.56	19.35	72.72	7.37	.608
	.60	19.20	73.26	6.98	.590
Crozer, No. 2	.68	19.18	71.86	8.28	.589
Houston	.50	17.94	74.19	7.37	.910
	.84	18.49	75.96	4.71	.676
	.46	18.66	73.20	7.68	.610
	.60	18.36	74.45	6.59	.734
Uplands	.34	19.48	75.61	4.57	.4–5
	46	18.76	74.31	6.47	.367
	.70	19.70	74.27	5.33	.391
	.50	19.31	74.73	5.46	.391
Powhatan	.74	18.72	72.23	8.51	.496
	.50	18.10	70.69	10.65	.525
	.58	19.97	71.47	7.98	.498
	.61	18.95	71.40	8.98	.506

The bottom lines are the average of the preceding three.

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	Water.	Vol't'le matter.	Fixed carbon.	Ash.	Sulph.
Lynchburg	.56	18.52	74.51	6.41	.509
	.52	18.75	72.46	8.27	.355
	.45	19.11	74.94	5.50	.537
	.51	18.79	73.97	6.73	.534
Elkridge	.84	19.62	73.40	6.14	.361
	.87	18.51	72.58	8.04	.349
	.73	18.54	73.09	7.64	.337
	.81	18.89	73.02	7.27	.349
Algoma	.56	17.83	75.72	5.89	.465
	.76	18.34	75.38	5.52	.437
	.48	18.56	75.89	5.07	.459
	.60	18.24	75.66	5.49	.454
Gilliam	.72	18.35	76.13	4.80	.317
	.61	17.33	73.98	8.08	.352
	.71	18.13	73.35	7.81	.322
	.68	17.94	74.49	6.90	.330
Rolfe	.46	18.36	74.03	7.15	.441
	.52	17.89	75.61	5.88	.325
	.46	17.57	74.40	6.57	.303
	.51	17.94	74.68	6.53	.623
Roanoke.	.45	19.05	75.21	5.29	.305
	.54	18.46	75.24	5.76	.310
	.30	19.51			
Roanoke (the third line)	.36	19.51	73.19	4.94	.285
Indian Ridge C. & C. Co.	.45	19.01	75.21	5.33	.303
	.55	18.93	75.96	4.56	.313
	.72	19.69	72.94	6.65	.289
	.63	19.31	74.45	5.60	.301
153 Arlington.	.59	18.49	74.62	6.28	.443
	.48	19.44	73.37	6.71	.406
	.78	18.25	74.32	6.55	.434
	.62	18.73	74.10	6.55	.428
McDowell	.44	18.44	74.21	6.91	.327
	.62	18.96	73.07	7.36	.403
	.35	18.65	74.92	6.08	.258
	.47	18.68	74.07	6.7	.329
Ashland	.52	18.18	75.89	5.41	.352
	.30	19.51	74.31	5.68	.336
	.51	18.84	75.10	5.55	.344
Greenbrier	.66	18.97	74.44	5.93	.289
No. 1.	.75	19.47	72.08	7.70	.245
(Extension No. 1 to No. 2.)	.60	18.30	74.67	6.43	.307
	.67	18.91	73.73	6.69	.280
Keystone	.70	17.57	75.40	6.33	.229
	.67	18.04	74.69	6.90	.261
	.70	17.90	76.04	5.36	.234
	.69	17.84	75.38	6.10	.241

The bottom lines are the average of the preceding ones.

	Water.	Vol'tile matter.	Fixed carbon.	Ash.	Sulph.
Pulaski	.94	17.62	73.27	8.17	.329
	.85	18.19	73.52	7.44	.309
	.76	17.61	75.54	6.19	.221
	.85	17.77	74.11	7.27	.286
Eureca	.68	18.76	75.03	5.53	.351
	.48	19.95	72.83	6.74	.361
	.66	18.40	74.04	6.90	.344
	.61	19.04	73.97	6.39	.352
Shawnee	.46	17.48	74.27	7.79	.297
	.66	17.86	73.87	7.61	.321
	.44	18.32	75.07	6.17	.308
	.52	17.89	74.40	7.19	.309
Empire	.86	18.11	73.78	7.25	.249
	.79	17.91	73.37	7.93	.267
	.70	18.18	75.51	5.61	.256
	.78	18.07	74.22	6.93	.257
Peerless	.63	18.56	75.29	5.53	.336
	.44	18.29	75.90	5.37	.357
	.82	17.86	74.43	6.89	.344
	.63	18.24	75.21	5.93	.340
Bottom Creek	.52	19.34	74.18	5.96	.351
	.68	20.96	73.08	5.28	.325
	.52	17.70	72.43	9.35	.341
	.57	19.33	73.23	6.86	.339
Tidewater	.66	18.27	73.81	7.26	.361
	.64	17.7	74.92	6.70	.339
	.74	18.14	75.22	5.90	.355
	.68	18.05	74.65	6.62	.352
Average of Ill. Steel Co.'s determinations	.63	19.02	74.11	6.24	.377

Analysis of Pocahontas coal.

By W. B. WILEY, *Chemist.*

154 (Endorsed:) Exhibit "Analysis." Circuit court U. S., dist. W. Va. Filed in open court this 5 day of May, 1897. L. B. Dellicker, clerk.

Exhibit "Commendations," referred to in the foregoing answer, are in the words and figures following, to wit:

Daniel Harrigan, wholesale and retail dealer in coal and wood, 126 W. Main St. and 520 N. Rose St.

Terms: Cash.

KALAMAZOO, MICH., *April* 17, 1897.

W. H. Coffman Coal Co., Bluefield, W. Va.

GENTLEMEN: I wish to know if you can give me prompt shipments. Provided you can, I have a good customer. The coal is

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satisfactory to him. He must depend upon having it when he orders.

Please advise how prompt shipments you can make.

Yours truly, DANIEL HARRIGAN, *S. M. C.*

R. J. Reynolds Tobacco Company.

Paid in capital, $300,000.

(Vignette) Board of directors. (Vignette.)

R. J. Reynold-, W. N. Reynolds, Robert Critz, W. R. Reynolds.
R. J. Reynolds, pres't; W. N. Reynolds, vice-pres't; Robert Critz, sec'y & treas.

WINSTON, N. C., *April 27th*, 1897.

The Pocahontas Coal & Coke Co., Bluefield, W. Va.

DEAR SIRS: You have overstocked us with coal, and would
155 beg you not to ship any more till ordered. We have 3 cars on track, one of which you should not have shipped, as we wired you, as we think, in time to stop this one. The coal is first class, and gives us better results than any coal we have used.

You will please discontinue the weekly shipment arrangement we have until we can gage our requirements or adjust to the change of season, coal, etc. If you have a customer here to whom we could turn over one of the three cars, would thank you to wire us.

Yours truly, R. J. REYNOLDS TOBACCO CO.

Dictated.
W. R. R.

W. B. Taylor. J. P. Taylor.

Vignette, with words "Chew Red Eye tobacco." "Taylor Bros., Winston, N. C."	Taylor Bros., manufacturers of plug T. & twist tobacco.	Vignette, with words "Chew Stars and Bars." "Taylor Bros., Winston, N. C."

WINSTON, N. C., 4, 26, '97 *189.*

The Pocahontas Coal & Coke Co., Bluefield, W. Va.

DEAR SIRS: Replying to yours of the 4, 24, we beg to say that we have used only two cars of your coal, but we have been very well pleased with the coal thus far, & much prefer it to that which we purchased of Castner & Curran. It seems to be cleaner, & has, as far as we can see, no more slate in it.

Yours very truly, TAYLOR BROS.
J. P. T.

Rowe & Woodruff, dealers in coal, wood, coke, hay, and feed, 235 W. Main St.

BATTLE CREEK, MICH, *Dec.* 3, 1890.

Pocahontas Coal & Coke Co., Bluefield, W. Va.

GENTLEMEN: Enclosed find a copy of a communication
156 which we fail to understand. We have bought several cars of coal of you as Pocahontas coal, and have sold it as such. We like your coal very well so far, and if we are to be protected in the sale of it; hope to do a very fair business with you. Of course our trade is not a large one, as this is a small city—about 18,000—but we have handled over 700 cars of coal in the last year, and some of our steam customers are leaning toward smokeless coal. We have heretofore used the Turkey Knob with excellent satisfaction, and have made no effort to obtain Pocahontas. A small firm, whose name and local reputation we will not here mention, have claimed to have the exclusive agency for Pocahontas coal, and have been selling at a fancy figure, feeling confident that they had a monopoly on this coal; meantime, we have tried your coal and like it. We do not wish to get in any trouble, but perhaps we are unnecessarily alarmed. Will we be compelled to drop your coal, or will you protect us in selling what we buy as what we buy? Kindly give this your immediate attention, and oblige.

Yours very resp'y, ROWE & WOODRUFF.

Law office of J. Walter Douglass, patents and patent causes; legal department: Philadelphia, 914 Walnut St.; Washington, 615 Seventh St.

PHILADELPHIA, *December 3rd*, 1896.

Mess. Rowe & Woodruff, Battle Creek, Michigan.

GENTLEMEN: I am informed by my clients, Messrs. Castner & Curran, of this city, that you are offering for sale and selling a coal under the name "Pocahontas." I have to inform you in their behalf that this is a clear case of infringement upon their trade-mark registered September 29th, 1885. You are hereby notified to forthwith desist from the further selling of coal under their trade-mark, as the right to use said trade-mark is exclusively vested in my clients. Unless you forthwith cease to sell coal under their trade-mark, a bill in equity will be filed against you, and an injunction applied for to restrain you from your unlawful acts in the premises.

I await advices hereto from you within 10 days from the date
157 hereof before filing said bill and proceeding, in order to give you an opportunity to notify me that you will desist from said infringement without suit.

Yours very truly, J. WALTER DOUGLASS,
Attorney for Castner & Curran.

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T. S. Williams & Co., leaf tobacco dealers and brokers. Large facilities for handling bright leaf and strips. Correspondence and orders sol. Samples sent on application.

(Vignette.)

Cable address: Spencer.

DANVILLE, VA., U. S. A., *April 23rd*, 1897.

Pocahontas Coal & Coke Co., Bluefield, Va.

DEAR SIRS: The car-load of coal you shipped us has been duly received, and we have been now using same for several days with entire satisfaction.

Enclosed please find check for $22.96, which, together with freight bill for $68.06, you will please acknowledge as settlement in full for this car, N. & W. 11294.

Yours truly, T. S. WILLIAMS & CO.

Receipted.

(Endorsed:) Castner & Curran *vs.* W. H. Coffman. Exhibits "Commendations," with answer of —. Circuit court U. S., dist. W. Va. Filed in open court this 5 day of May, 1897. L. B. Dellicker, clerk.

The affidavit of Justus Collins, referred to in the order of May 5, 1897, above set forth, is in the words and figures following, to wit:

158 United States Circuit Court, District of West Virginia.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name of and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Firm Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

STATE OF WEST VIRGINIA, *County of Kanawha.*

This day personally appeared before the authority, Justus Collins, who, being by me first duly sworn, upon his oath, says that he is an operator and a part owner in the mines known as the Louisville Coal & Coke Co., and the Greenbrier Coal & Coke Co. in the Pocahontas coal region, in West Virginia; and that he is well acquainted with that section of the country, with the coal produced there, and the practical operations in that field. That he is acquainted with the general course of coal operations in other sections of the country besides West Virginia, and that he knows it is usual to inspect coal, or have it inspected, before shipment is made from the mines. That prior to the intervention of Castner & Curran, about April 1st, 1895, coal in the Pocahontas field had been inspected, and since Mess.

Castner & Curran have undertaken to regulate that inspection, in April, 1895, there has been no change either in the grading or in the verification of the product.

That the operators in the field furnish the men who perform the work of inspection; that these men are common laborers, as well as the sub-inspector, who acts as foreman at each tipple in the Pocahontas district, and are carried on the pay-rolls of the several companies themselves, with the exception of the foreman and chief inspector. In addition to that, a charge is made on all coal operators by Castner & Curran of about 1c. per ton to cover the cost of the inspection.

JUSTUS COLLINS.

Sworn to and subscribed before me this 4th day of May, 1897.
[NOTARIAL SEAL.] JOHN L. THORNHILL,
Notary Public.

159 (Endorsed:) Castner & Curran *vs.* W. H. Coffman. Affidavit of Justus Collins. Circuit court U. S., dist. West Va. Filed in open court this 5 day of May, 1897. L. B. Dellicker, clerk.

The affidavit of J. A. Welch, referred to in the order of May 5, 1897, above set forth, is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Firm Name and Style of the Pocahontas Coke & Coal Company and W. H. Coffman Coke Co., Defendants.

To the honorable the judge of the circuit court of the United States in and for the district of West Virginia, in equity:

STATE OF WEST VIRGINIA, *Mercer County.*

At the request of W. H. Coffman I will state that I have been in what is known locally as the Pocahontas Flat Top coal-field, I may say since 1873, having in that year gone quite over the waters of Bluestone and the head-waters of the Guyandotte and traced what is known as the Pocahontas Flat Top, or No. 3 bed, which is the only bed now mined in the Pocahontas Flat Top field.

In 1881 I was employed to take charge of the development of the field. For the first six months my work was confined to the waters of Bluestone river and its tributaries, Mill, Simmons, Flipping, Crane, Widemouth and Richland creeks, all of which flow from Flat Top mountain to Bluestone river.

In the year 1882 I made a careful examination of the bed
160 on Elkhorn, following the bed from the head of Mill creek to the crop line on the waters of Elkhorn, a tributary of Tug

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river, of Big Sandy. In all I was in the employment of the then Bluestone, now the Flat Top Coal Land Association, as the resident engineer for about seven years. My work was confined to following the crop line and surveying land lines. There is but one vein or bed of coal. The No. 3. or Pocahontas Flat Top bed, is the only bed mined in this field, including the mines worked on the waters of Bluestone and North and South forks of Elkhorn.

The number 3, or Pocahontas bed, is from 10 to 12 feet thick. On the head-waters of Elkhorn the bed becomes thinner. On its northwestern dip, and where it takes cover under Elkhorn, it is six feet thick.

An article, over my signature, in the industrial edition of the Bluefield Telegraph of Nov. 1st, 1896, may go as part of my sworn statement, except a statement in writing over my signature at the close of the article, as of April 30, 1897.

(Signed) I. A. WELCH.

STATE OF WEST VIRGINIA, *County of Mercer,* } *To wit:*

This day personally appeared before me, the subscriber, a notary public in and for said county, I. A. Welch, and made oath in due form of law, that the foregoing writing is true to the best of his knowledge and belief, and that the article over his signature, published in the industrial edition of the Bluefield Telegraph, as of the 1st of Nov., 1896, may be taken as a part of his said sworn statement as modified in writing over his signature, as of the 30th day of April, 1897.

Given under my hand and notarial seal this 30th day of April, 1897.

A. I. GODFREY,
[NOTARIAL SEAL.] *Notary Public.*

(Endorsed:) Circuit court U. S., dist. W. Va. Filed in office this 5 day of May, 1897. L. B. Dellicker, clerk.

The affidavit of C. Botsford, referred to in said order of May 5, 1897, is in the words and figures following, to wit:

161 United States Circuit Court, District of West Virginia.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Firm Name of and Style of the Pocahontas Coke & Coal Co. and W. H. Coffman Coke Co., Defendant.

I, C. Botsford, state that I live at Worth, McDowell county, West Virginia, and have been general manager of the Indian Ridge Coal & Coke Co. from the time this operation was first opened until the present time.

We first commenced shipping coal through the agency styled the Pocahontas Coal Co., and continued such shipments until the 1st day of April, 1895. The 1st day of April, 1895, we commenced shipping our coal through the agency styled Castner & Curran, and continued said shipments until the 1st day of January, 1896. On the 1st day of January, 1896, we commenced shipping our coal through the agency styled the Pocahontas Company, who have Castner & Curran as their sole agents both for tidewater and line trade. Such shipments were continued until the 1st day of November, 1896, at which time we discontinued allowing our coal to go through the agency of the Pocahontas Company, and commenced shipping through the agency of W. H. Coffman, doing business under the style of the Pocahontas Coke & Coal Co.

During the time we were shipping to the Pocahontas Coal Co., Castner & Curran, or the Pocahontas Co., this coal was inspected at the tipple during the time it was being loaded into the railroad cars, as is usual in mining operations.

Castner & Curran had no inspection prior to 1894. The inspectors employed by Castner & Curran, although under their control, *was* practically paid by the operators, as a cent a ton was charged by Castner & Curran against the different operators for such inspection.

Since we began shipping our coal through the Pocahontas Coke & Coal Co. the same inspector was employed with the same assistants for two months or more, with instructions to inspect the coal precisely the same as he did while working under Castner & Curran's orders. These were not only my instructions to the said inspectors, but I also received instructions to like effect from
162 the president of our company. About two months after we began shipping our coal through the Pocahontas Coke & Coal Co., I dispensed with the services of that inspector and employed another, whom I consider more competent in every way, he having the same assistants to perform the same duties.

I know that our coal is inspected as rigidly since we have been shipping it through the Pocahontas Coke & Coal Company's agency as it was previously.

The mining of our coal is carried on now as it has always been, and so far has met with the complete approbation of the engineer employed by the Flat Top Coal Land Association, whose duty it is to see that the different operations mine their coal properly, and according to the terms of their leases.

We are mining what is commonly known as the Pocahontas No. 3 vein, located within the Pocahontas Flat Top coal field, the same vein being mined by the Rolfe Coal & Coke Co. on our right, and the Roanoke Coal & Coke Co. on our left, who dispose of their product as Pocahontas coal to the Pocahontas Co., who have Castner & Curran as their sole agents.

Witness my hand and seal this 4th day of May, 1897.

C. BOTSFORD.

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STATE OF WEST VIRGINIA, *County of Kanawha,* } *To wit:*

I, John L. Thornhill, a notary public in and for the said county and State, do certify that C. Botsford, whose name is signed to the foregoing affidavit, this day personally appeared before me in said county, and being by me first duly sworn, made oath that the statements contained in the said affidavit are true, so far as they are made upon his own knowledge, and that so far as they are made on the information secured from others, he believes them to be true.

Given under my hand and official seal, this 4th day of May, 1897.

[NOTARIAL SEAL.] JOHN L. THORNHILL, *N. P.*

(Endorsed:) Castner & Curran *vs.* W. H. Coffman. Affidavit of C. C. Botsford for —. Circuit court U. S., D. W. Va. Filed in open court this 5 day of May, 1897. L. B. Dellicker, clerk.

163 The affidavit of Worth Kilpatrick, referred to in said order of May 5, 1897, is in the words and figures following, to wit:

COUNTY OF FAYETTE, *State of Penna.,* } *ss:*

Personally appeared before me John Kurtz, a notary public in and for said county, Worth Kilpatrick, who being duly sworn doth depose and say that he is president of the Indian Ridge Coal and Coke Company, a corporation chartered under the laws of the State of West Virginia for the purpose of mining coal, manufacturing coke and shipping and selling said products and doing a general retail merchandise business; that he has been president of said company since its organization. The said Indian Ridge Coal and Coke Company commenced to ship coal about the 4th day of April, 1894, and to the best of deponent's knowledge all coal shipped up to the 1st day of November, 1896, passed through the agency of Castner and Curran. And the deponent further says that during all that period he has not received any notice (not even heard it intimated) either from Castner and Curran, or any one else, that the coal mined and shipped from the Indian Ridge Coal and Coke Company's mine was in any way inferior to any other coal mined in the "Pocahontas field," nor that the inspection of their coal was more rigid than that of any other coal mined in the field (there being inspectors at each mine in the entire region at all times), but on the contrary was always led to *the* believe that the coal mined and shipped from the Indian Ridge Coal and Coke Co.'s plant was of a superior quality, much of which was used for the most select trade.

There were three distinct trades supplied with coal from the "Pocahontas coal-field," and a separate price paid for each trade, viz: "Line trade coal," or coal sold along line of railroad, "locomotive coal," or that used by the railroad company, and "tidewater coal," or coal used on ocean steamers and sold in large cities, such as New York, Boston, Phila., &c., there to come in competition with all the best coals in the general market.

The price paid the Indian Ridge Coal and Coke Company for the

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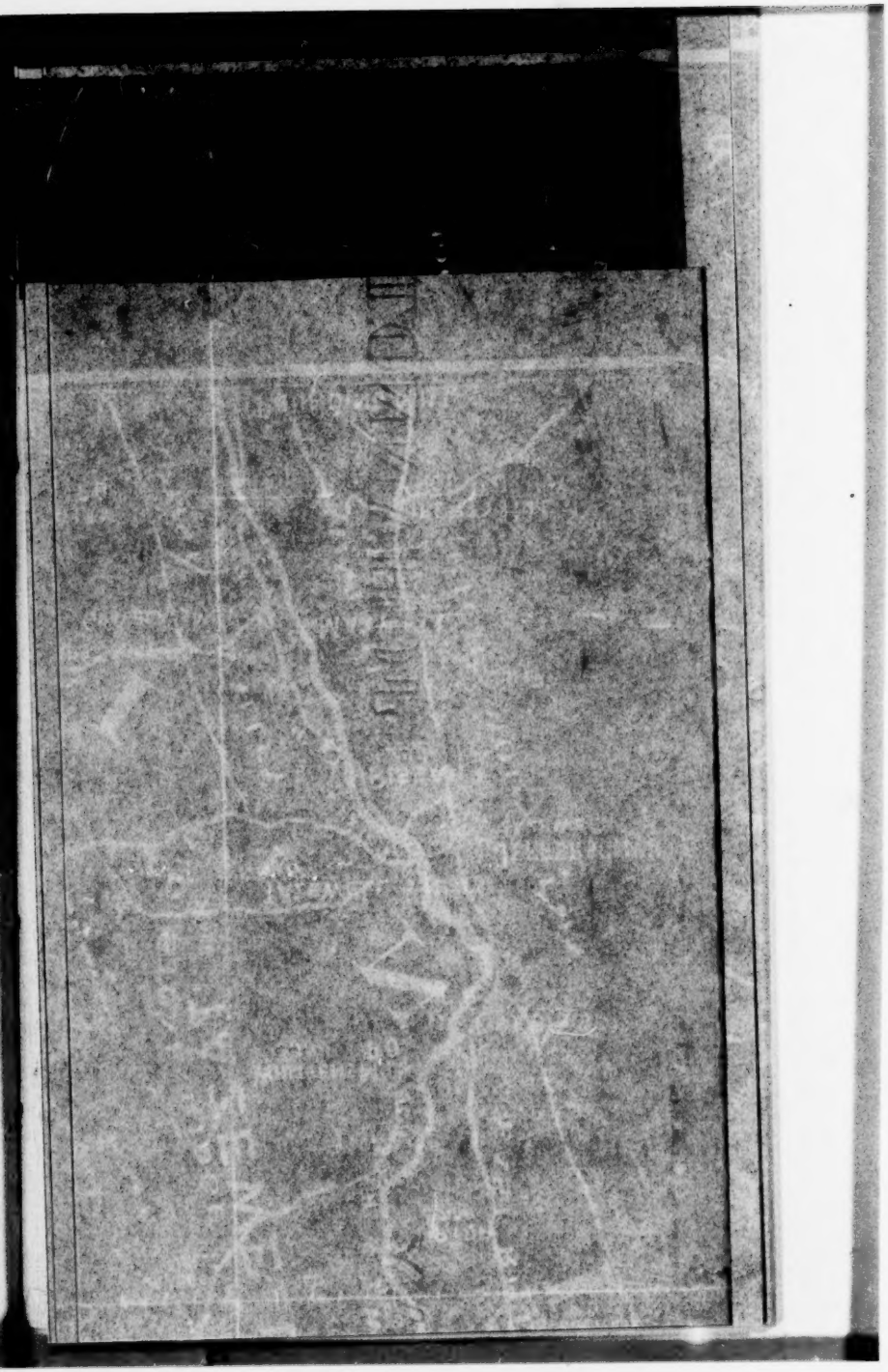

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BE FILMED

last eighteen or twenty months, that coal of said company, was handled by said Castner and Curran was for "tidewater coal," according to their *schedule* of prices, and thereby indicated that the coal mined and shipped from mines of the Indian Ridge Coal and Coke Company was going into the best markets of the country.

164 During the entire time Castner and Curran handled coal of said company, or since, the deponent has no knowledge of said company being docked, nor any com*l*paint being made on account of inferior quality.

The deponent further saith that the coal of the Indian Ridge Coal and Coke Company is located in the heart of the "Pocahontas coal-field," see map Exhibit "A," and is joined in the field by four other coal companies, viz: "Rolph," "Roanoke," "Arlington," and "Ashland," see Exhibit "B."

He further saith that he had not received any notice or other information that the word "Pocahontas" was *was* claimed to be copyrighted or patented, until recently, when he was so informed by Mr. W. H. Coffman, although the word "Pocahontas" has been used on letter-heads of the said Indian Ridge Coal and Coke Company, in describing their coal, from organization of said company, see Exhibit "C." The word- "Pocahontas coal" *was* also used by "Pocahontas Coal Company" and "The Pocahontas Company" on their letter-heads. See Exhibit- "D" & "E."

Letter of Castner and Curran, dated Oct. 1st, 1895, see Exhibit "F," does not show, or in any way intimate, that they, the said Castner and Curran, had the sole right to use the said word "Pocahontas" in connection with coal. And deponent further saith that Castner and Curran have made an effort to get the Indian Ridge Coal and Coke Company's coal to sell, since W. H. Coffman has been selling said company's coal, and even at that late date they made *no mention* of said company's coal being of an *inferior quality*.

Witness my hand and seal.

WORTH KILPATRICK, *Pres't.* [SEAL.]

Sworn to and subscribed before me this 28 day of April, 1897.

[NOTARIAL SEAL.] JOHN KURTZ,
Notary Public.

Exhibit "A," referred to in the foregoing affidavit of Worth Kilpatrick, is a very complicated map. The following is a true copy of all the essential features of said map, showing the position of the Indian Ridge Coal and Coke Co., with reference to the Pocahontas coal-field, for which purpose it was filed with said affidavit, the names only of some of the smaller places and creeks being omitted.

(Here follows map marked p. 165.)

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166 & 167 Exhibit "B," referred to in the foregoing affidavit of Worth Kilpatrick, is in the words and figures following, to wit:

(Here follows map marked p. 168.)

169 & 170 Exhibit "C," referred to in the foregoing affidavit, is in the words and figures following, to wit:

All contracts are contingent upon strikes, accidents or delays beyond our control.

Indian Ridge Coal and Coke Company, miners and manufacturers of Pocahontas coal and coke.

Worth Kilpatrick, president; Lloyd Johnston, vice-president; J. A. Armstrong, sec'y and treas.; C. Botsford, gen. manager.

Works, Indian Ridge, McDowell county, West Va., Worth P. O.

CONNELLSVILLE, PA., —— —, 189–.

(Endorsed:) Exhibit "C."

Exhibit "D," referred to in the foregoing affidavit, is in the words and figures following, to wit:

D. H. Matson, president; C. B. Bell, secretary and treasurer; H. N. Claxton, general agent; John Twohy, supt. piers, Norfolk.

Pocahontas Coal Co., shippers of celebrated Pocahontas coal.

(Vignette.)

Agreements contingent upon strikes or other causes beyond our control.
Railway weights govern.
Prices subject to change without notice.

ROANOKE, VA., *April 19th*, 1894.

C. B. Botsford, Esq., G. M. Indian Ridge Coal & Coke Co., Jones, W. Va.

DEAR SIR: Your letter of April 14th received and contents noted. At present I am not in position to estimate the number of
171 box cars that we can dispose of in the West. In my estimation there would be very little tonnage loaded in box cars to be sold during the summer, but in fall and winter seasons this tonnage would undoubtedly increase. I have written to our representatives in Cincinnati, Chicago and Cleveland to furnish me with estimate of this business, and as soon as I hear from them I will be in position to reply to your letter intelligently. In the meantime I have no advice from your company that they propose to allow us to handle their coal after May 1st at the price named by Mr. Kimball at a meeting of the coal producers held in Roanoke April 5th. The price then named by Mr. Kimball was 70c. per ton

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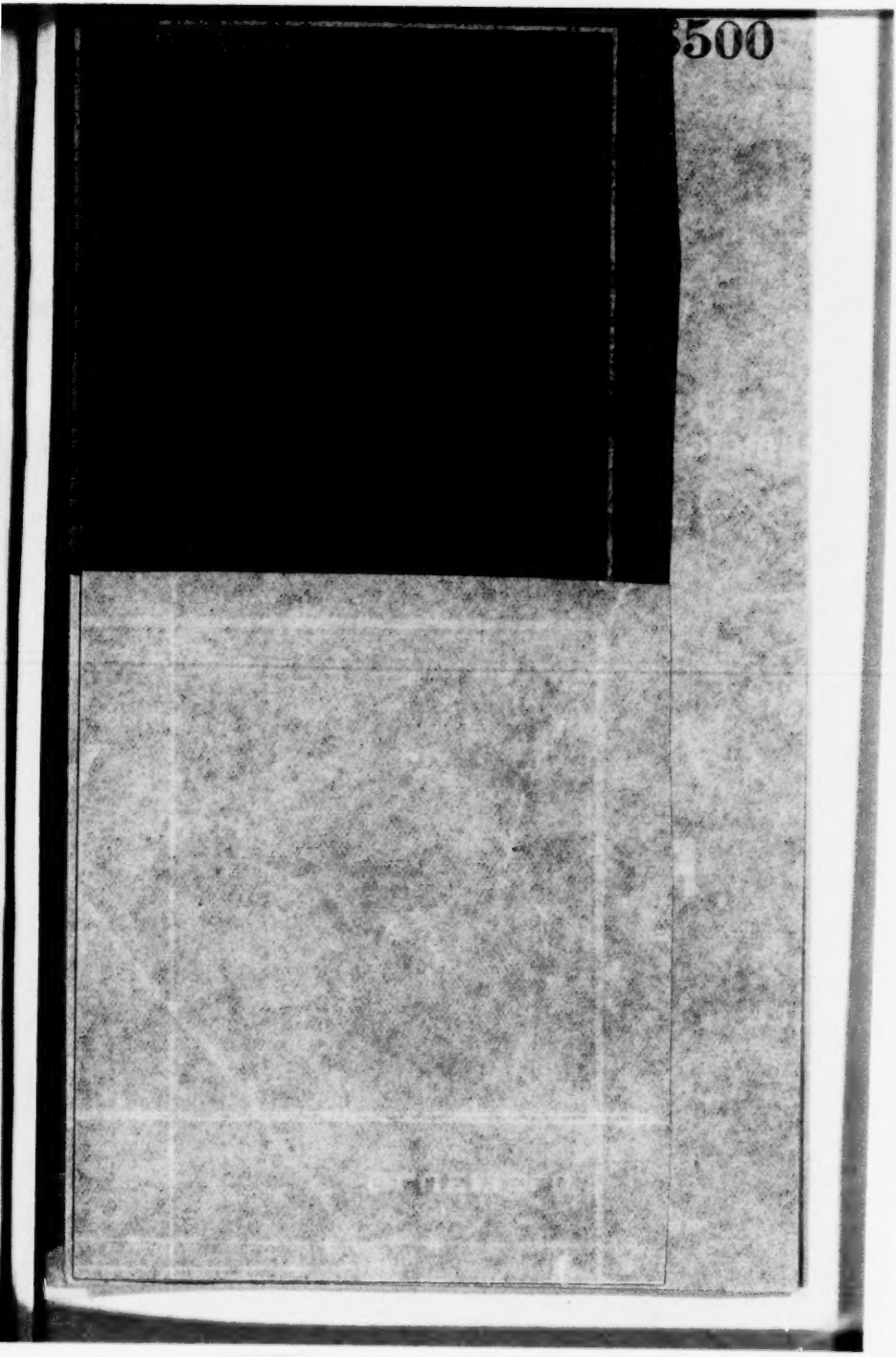

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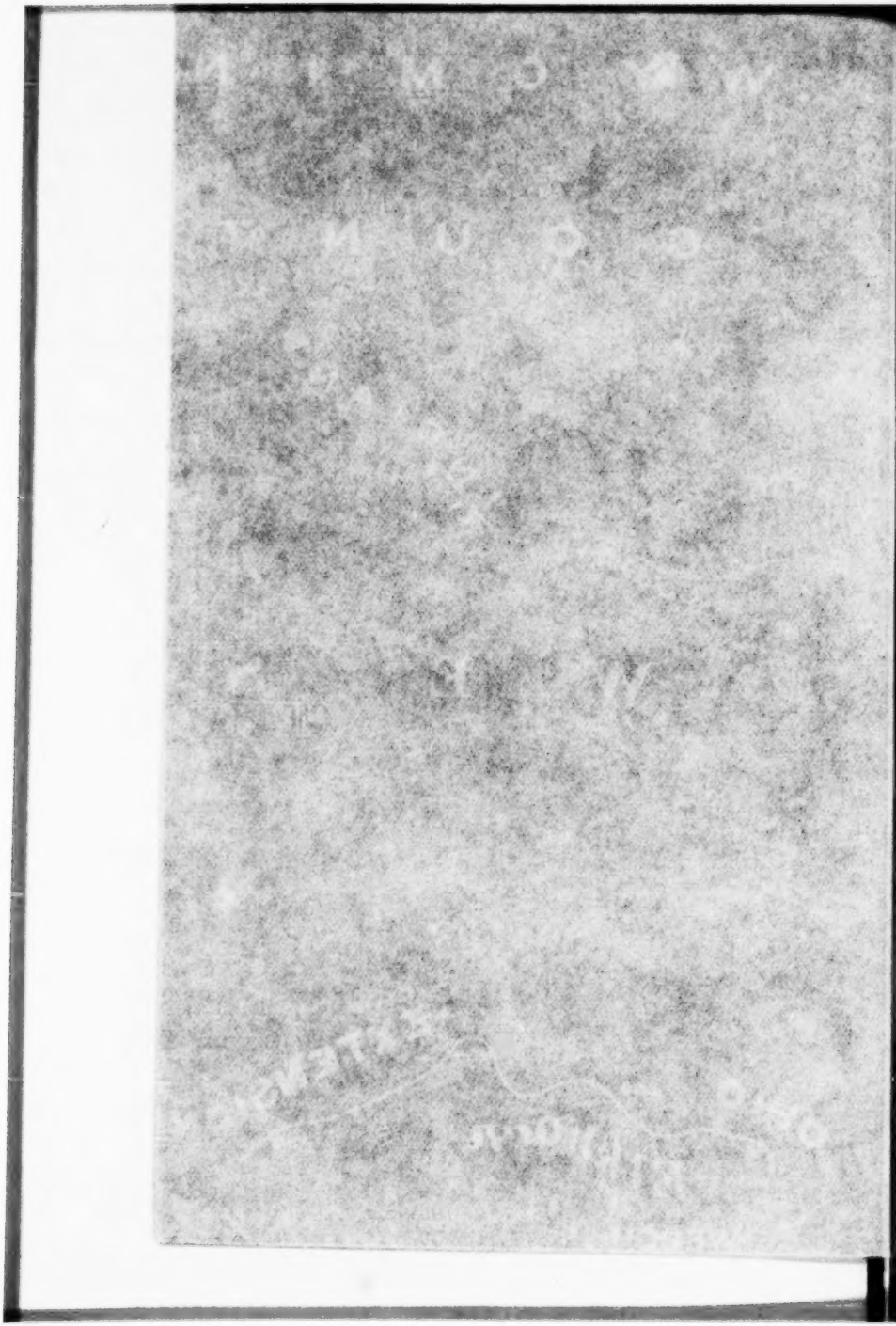

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of 2,240 pounds for run-of-mine coal, and 15c. additional for lump and nut. Quite a number of operations in the field have declined to accept these figures, and I would thank you to advise me of the position of your company in this matter at as early a date as possible.

Yours truly, D. H. MATSON, *President.*

(Endorsed:) Exhibit "D."

Exhibit "E," referred to in the foregoing affidavit, is in the words and figures following, to wit:

Office of the Pocahontas Company, shippers of the celebrated Pocahontas Flat Top coal and coke.

BRAMWELL, W. VA., *Octo.* 1, 1895.

Indian Ridge C. & C. Co., Worth.

DEAR SIR: Your president and secretary are requested to visit the office of the Pocahontas Company, Bramwell, West Va., on Saturday, October 5th, 1895, at ten (10) o'clock a. m., for the purpose of entering into a coke contract with the Pocahontas Company. Other producers of coke in the Flat Top field have been likewise requested. Those responding will please bring with them their corporate seal in order that the imprint of same can be made upon the contract.

Yours respectfully, J. J. TIERNEY, *President.*

(Endorsed:) Exhibit "E."

172 Exhibit "F," referred to in the foregoing affidavit, is in the words and figures following, to wit:

328 Chestnut St., Philada., Pa.
70 Kilby St., Boston, Mass.
Terry building, Roanoke, Va.
Board of Trade building, Columbus, Ohio.
1 Broadway, New York.
36 Main St., Norfolk, Va.
Old Colony building, Chicago, Ill.
Neave building, Cincinnati, Ohio.
4 Fechurch Ave., London, England.

Castner & Curran, general agents Pocahontas coal.

(Vignette.)

PHILADELPHIA, *October* 1*st*, 1895.

Mr. Kilpatrick, pres't Indian Ridge Coal & Coke Co., Connellsville, Pa.

DEAR SIR: Your favor of — at hand.

As there are many matters of interest we desire to discuss with you and the other operators that will be conducive to the prosperity of the field during the coming year, would say that both members of our firm intend visiting your coal-field this month. We expect to leave here the evening of the 13th, arriving at Bluefield the afternoon of the 14th, and will spend several days in making a tour

of the field, calling on the operators and visiting their various coll-eries. We will be much pleased to have you and the officers of your company dine with us at Graham inn on Thursday evening, 17th instant. Will you kindly let us know how many we may expect from your company, in order that we may make suitable arrangements.

Yours very truly, CASTNER & CURRAN.

(Endorsed:) Exhibit "F."

The said affidavit of Kilpatrick, with the exhibits thereto attached, is endorsed: Affidavit of Worth Kilpatrick and maps for W. H. Coffman. Circuit court U. S., dist. W. Va. Filed in open court this 5 day of May, 1897. L. B. Dellicker, clerk.

The affidavit of W. S. Cope, referred to in the order of May 5, 1897, is in the words and figures following, to wit:

173 United States Circuit Court, District of West Virginia.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Firm Name and Style of the Pocahontas Coke & Coal Company and W. H. Coffman Coke Co., Defendant.

To the honorable the judge of the circuit court of the United States in and for the district of West Virginia, in equity:

STATE OF WEST VIRGINIA, *Mercer County.*

W. S. Cope states that he lives at McDowell, McDowell county, West Virginia, is now in the employment of the Greenbrier Coal & Coke Co., the Louisville Coal & Coke Co. and the Roanoke Coal & Coke Co. as mining engineer.

These mines are situated on the waters of Flipping creek and the North fork of Elkhorn, and mine the No. 3 bed of coal commonly known as the Pocahontas Flat Top.

The Roanoke Coal & Coke Co.'s lease adjoins the Indian Ridge Coal & Coke Co.'s lease, and I am very confident that this is the No. 3 bed, or Pocahontas Flat Top bed that the Indian Ridge Coal & Coke Co. are now mining, and this is the only bed of coal mined in the Pocahontas Flat Top field.

W. S. COPE.

STATE OF WEST VIRGINIA, *County of Mercer.* *To wit:*

I, W. H. Campbell, a notary public in and for said county and State, do certify that W. S. Cope, whose name is signed to the foregoing affidavit, this day personally appeared before me in said

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county and, being by me first duly sworn, made oath that the statements contained in the *statements contained in the* said affidavit are true, so far as they are made on his own knowledge, and that so far — are made upon information secured from others, he believes them to be true.

174 Signed under my hand — official seal this 1st day of May, 1897.

[NOTARIAL SEAL.] W. H. CAMPBELL, *N. P.*

(Endorsed:) Circuit court U. S., dist. W. Va. Filed in open court this 5 day of May, 1897. L. B. Dellicker, clerk.

The affidavit of A. R. Paddock, referred to in the said order of May 5, 1897, is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Firm Name and Style of the Pocahontas Coke & Coal Co. and W. H. Coffman Coke Co., Defendant.

To the honorable the judge of the circuit court of the United States in and for the district of West Virginia, in equity:

STATE OF WEST VIRGINIA, *County of Mercer.*

I, A. R. Paddock, of Bramwell, West Virginia, am mining engineer for various corporations in the field, and engineer for the Indian Ridge Coal & Coke Co. To the best of my knowledge and belief the Indian Ridge coal is of the same quality as any other coal in this coal-field. It adjoins the Rolfe mine on one side and the Arlington mine on the other, the product of both being sold through Castner & Curran as Pocahontas Flat Top coal from the same vein. I don't know of any other coal but the No. 3 being mined in this field.

A. R. PADDOCK.

175 STATE OF WEST VIRGINIA, *County of Mercer,* *To wit:*

I, W. H. Campbell, a notary public in and for said county and State, do certify that A. R. Paddock, whose name is signed to the foregoing affidavit, this day personally appeared before me in said county and, being by me first duly sworn, made oath that the statements contained in the said affidavit are true, so far as they are made upon his own knowledge, and that so far as they are made on information secured — others, he believes them to be true.

Signed under my hand and official seal this 1st day of May 1897.

[NOTARIAL SEAL.] W. H. CAMPBELL, *N. P.*

(Endorsed:) Circuit court U. S., dist. W. Va. Filed in open court this 5 day of May, 1897. L. B. Dellicker, clerk.

The affidavit of F. J. Kimball in rebuttal referred to in the foregoing decree of May 5th, 1897, is in the words and figures following, to wit:

United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

STATE OF PENNSYLVANIA, *County of Philadelphia,* } *ss:*

Frederick J. Kimball, of Delaware county, Pennsylvania, being duly sworn according to law, deposes and says that he has heretofore made an affidavit in the above-entitled cause, verified the twenty-sixth day of March, 1897; that in addition to the matters testified to in said affidavit this deponent wishes positively
176 and directly to depose that in 1881, when deponent explored that portion of Tazewell county, Virginia, in which the town of Pocahontas is now situated, the place was a wilderness and had no distinct geographical name; that the town of Pocahontas was built and owned by the Southwest Virginia Improvement Company and had no legal existence until its incorporation in 1884; that prior to this incorporation of the town of Pocahontas by the Southwest Virginia Improvement Company the region in and about the town of Pocahontas was not known nor ever had been known as the "Pocahontas" coal region, and it was not until the coal of the Southwest Virginia Improvement Company had become well established and known in the markets of the world as "Pocahontas" coal that the whole region producing such coal was given the designation of "Pocahontas coal region. Prior to the opening of the mines of the Southwest Virginia Improvement Company coal was not known to exist in any quantity in this region, and being a wilderness, remote from railways, and without even carriage or wagon roads, and practically without population, this section of country had no distinctive designation. And further this deponent saith not.

FREDERICK J. KIMBALL.

Sworn to and subscribed before me this 28th day of April, A. D. 1897.

In city, county and State of N. Y.

[SEAL.]

PETER KIPP,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

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(Endorsed:) U. S. circuit ct., dist. W. Va. Castner *et al. vs.* Coffman. In equity. Affidavit of F. J. Kimball. Filed in open cou-t this 5 day of May, 1897. L. B. Dellicker, clerk.

The affidavit of I. A. Welch in rebuttal, referred to in the foregoing decree of May 5th, 1897, is in the words and figures following, to wit:

177 United States Circuit Court, District of West Virginia. In Equity.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of Pocahontas Coke & Coal Company and W. H. Coffman Coke Company, Defendant.

STATE OF VIRGINIA, *City of Norfolk*, } *ss*:

I. A. Welch, being duly sworn according to law, deposes and says that he resides at Bramwell, West Virginia, and is a civil engineer by profession, and is especially engaged in the examination, purchase and sale of mineral and timber lands, having been so engaged for the last 20 years or more; that in October, 1881, he was employed to take charge of the development of the Flat Top coalfield by the principal owners thereof, which included a part of the territory in Tazewell county, in the State of Virginia, in which the town of Pocahontas is now situated; that in 1881 this tract was a wilderness and valuable only because it was situated in the Great Flat Top region, which region was exceedingly rich in semi-bituminous coal; that during the years 1881 and 1882 the Southwest Virginia Improvement Company, which purchased its lands through Dr. James O'Keefe, opened its mines, built many houses for the reception of its employees, and in other ways converted the wilderness into a hive of industry; that the town which thus rapidly sprung up under the industry and capital of the said Southwest Virginia Improvement Company was not incorporated until the early part of the year 1884, and had no legal existence as the town of Pocahontas until it was so incorporated by the charter granted by the legislature of Virginia in that year; that the coal region in which the town of Pocahontas is and was situated has uniformly been known as the Great Flat Top region, a title derived from the Great Flat Top mountain, on the sides of which the various coal mines are located; that to deponent's certain knowledge, no coal, district, region, or field, in either Virginia or West Virginia, was known geologically or geographically a- "Pocahontas" prior
178 to the mining of coal by the said Southwest Virginia Improvement Company; and further this deponent saith not.

I. A. WELCH.

Sworn to and subscribed before me this 1st day of May, A. D. 1897.

[SEAL.] ROB'T W. LAMB,
Notary Public.

(Endorsed:) U. S. circuit court, dist. of W. Va. In equity. Castner *et al. vs.* Coffman. Affidavit of I. A. Welch. Filed in open court this 5th day of May, 1897. L. B. Dellicker, clerk.

And on another day, to wit:

At a circuit court of the United States for the district of West Virginia, continued and held at Charleston, in said district, on Thursday, the 27th day of May, A. D. 1897, an order was made and entered of record, which order is in the words and figures following, to wit:

SAMUEL CASTNER, JR., and HENRY P. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,
vs.
W. H. COFFMAN, Doing Business under the Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.
} In Equity.

The defendant having filed in court a petition and assignment of errors praying for an appeal in this cause from the decree rendered in this cause on the 5th day of May, 1897, it is ordered that an appeal be and is hereby awarded the said defendant from and to the said decree of May 5th, 1897, in this cause, to the United States circuit court of appeals for the fourth circuit; and the court requiring of the said defendant a bond of $500, the said defendant, with S. T. Litz and W. P. Payne as his sureties, made and entered into a bond before the court in the penalty of $500, with condition that the appellant (defendant here) should duly prosecute his
179 appeal with effect, and moreover pay the amount of costs rendered and to be rendered in case the said decree shall be affirmed and said bond is approved. But this order is not in any manner whatever to operate as a *supersedeas* to said decree of May 5th, 1897, during the pendency of this appeal.

The petition and assignment of errors, referred to in the foregoing order, are in the words and figures following, to wit:

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In the Circuit Court of the United States for the District of West Virginia.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants,

vs.

W. H. COFFMAN, Doing Business under the Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.

To the Honorable John J. Jackson, judge of the circuit court of the United States for the district of West Virginia:

The petition of W. H. Coffman, who is sued in the above-styled cause as doing business under the name and style of the Pocahontas Coke & Coal Company, and W. H. Coffman Coke Company, respectfully represents that, on the — day of April, 1897, the above-styled complainants presented their bill to one of the judges of said court, who granted the temporary injunction as prayed for in the bill, which order of injunction was afterwards, to wit: on the — day of April, 1897, modified, and your petitioner was required to appear at Charleston on the 4th day of May, 1897, before the judges of said court, to show cause, if any he could, why the injunction as prayed for in the bill should not be granted. The bill in said cause, from the best analysis your petitioner is able to give it, charges your petitioner with knowingly and fraudulently pirating an alleged trade-mark of the complainants, which trade-mark they claim to be the word, or name, "Pocahontas;" the complainants attempt to trace their claim and title to this alleged trade-mark in their bill as follows: That about the year 1882 a tract, or field, of semi-bituminous coal was opened and mined in Tazewell county, Virginia; that this coal was mined in the year 1882, and up to January,
180 1884, by a corporation in Tazewell county by the name of the Southwest Virginia Improvement Company; that this corporation sold its coal as "Pocahontas coal," having adopted the trade-mark "Pocahontas" as designating its output; that about the year 1884 a firm by the name of Castner & Co. was formed in the State of Pennsylvania, and purchased the coal so mined by the Southwest Virginia Improvement Company, and shipped and sold said coal as "Pocahontas coal," principally at tidewater points; that in the year 1889 the present complainants succeeded Castner & Co., and that they have continued to ship said coal as "Pocahontas coal," and as "Pocahontas Flat Top coal;" that about April 1st, 1895, the complainants, for the sum of $5.00, purchased from the Southwest Virginia Improvement Company the trade name, or mark, "Pocahontas." From all this it will be seen that the single word or name "Pocahontas" is the trade name, or mark, claimed by complainants. The prayer of the bill, in reference directly to this trade-mark, is that your petitioner be perpetually enjoined "from selling, or causing to be sold, shipping or billing, or causing to be shipped and billed, or offering for sale, or advertising for sale, or in any

manner of disposing of any coal designated as 'Pocahontas,' 'Pocahontas Flat Top," or any abbreviations of 'Pocahontas,' and from in any manner imitating or simulating said trade-mark 'Pocohontas,' or of using the name 'Pacahontas' in any manner whatsoever in connection with the coal busines-." Your petitioner is further charged with deceiving the public and dealers in coal by offering for sale and selling a very impure coal under the name and designation of "Pocahontas;" that by letters, notes and bills, whereupon the word-symbol "Pocahontas" is prominently displayed in a conspicuous manner, that purchasers of this socalled inferior coal would be liable to purchase it as the coal of your orators, which is superior, they allege, to petitioner's coal. Your petitioner promptly appeared before the court, which was then in session at the city of Charleston, West Virginia, on the 4th day of May, 1897, and made defence to said cause. He filed his demurrer to said bill which was overruled, and then filed his answer under oath, stating and describing the vast geographical extent of the coal-field known as the Pocahontas section, and when that coal-field acquired the appellation of the "Pocahontas coal-field," asserting that the complainants cannot claim protection for the exclusive use of a trade-mark or trade-name which would practically give them a monopoly in the productions of a great geographical section and in the sale of
181 coal other than that handled directly by them; that the word "Pocahontas" was a historical name, common among all English-speaking people; that the word "Pocahontas" had been used for many years as identifying the kind and quality of the peculiar kind of coal produced in that section; that from force of necessity, as well as for the information of the trade at large, the word "Pocahontas" is absolutely essential and inseparably connected with the marketing of the products of this vast field, and has been so used for years without objection. Your petitioner denied all the allegations of the bill, and especially showed and disclaimed that he had ever in any way perpetrated upon the complainants, or their business and trade, any fraud or deception; that he had never in any way attempted to sell, or sold, the product handled by him as the coal of complainants, and that he had never attempted in any way to simulate the complainants or their business. Affidavits and other items of evidence were offered, read and considered by the court on the hearing of said cause, and your petitioner refers to the entire record in said cause and makes it a part of his petition as fully as if the whole thereof was set out herein *in extenso*. Your petitioner avers that he is aggrieved by the decree which was rendered in this cause on the 5th day of May, 1897, enjoining him from using the name "Pocahontas," or "Pocahontas Flat Top," in connection with his business, and in allowing the complainants to have a right to use the word "Pocahontas" for the purpose of indicating that the coal handled by the complainants was from the Pocahontas field, and that the complainants had the sole right to use the name "Pocahontas," or "Pocahontas Flat Top," as indicating the character of the coal they sell; in short, petitioner avers that he is aggrieved and prejudiced by the whole of said decree rendered on the

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5th of May, 1897, and he is advised that he is entitled to an appeal from the said decree, wherefore your petitioner assigns the following errors:

I. The court erred in overruling the demurrer of the defendant to the bill in said cause.

II. The court erred in rendering any decree at all until the merits of the said cause, as put in issue by the pleadings, were fully developed by proofs adduced in the proper order of chancery proceeding and practice.

III. The court erred in entering the decree of May 5th, 1897, for the following reasons, among others:

182 First. Because the names "Pocahontas" and "Pocahontas Flat Top" are geographical names. The pleadings and proofs which were acted upon and actually before the court in this cause at the time the decree of May 5th, 1897, was entered, show that the names "Pocahontas" and "Pocahontas Flat Top" are the appellations for, and relate to, a vast geographical section of coal, lying partly in the counties of Tazewell and Wise, Virginia, and partly in the counties of Mercer, McDowell, Wyoming and Raleigh, West Virginia; that one vast coal seam in this section, known as the "Pocahontas" or "Nelson" seam, lying partly in Tazewell county, Virginia, and in McDowell, Mercer and Wyoming counties, West Virginia, is shown by an actual survey of its outcrop to contain about four hundred and eighty square miles, to be in some places thirteen feet thick, and of an average thickness throughout of six feet, and that there are now operating in this single seam thirty-eight several collieries.

Second. That by the current history of the past fifteen or twenty years, as well as of scientific investigation, and especially by the Geologic Atlas of the United States, promulgated by the Department of the Interior as a geological survey, published in the year 1896 by the Government, the Pocahontas section is ascertained to have an area of nine hundred and fifty-one square miles. Of all this petitioner is advised that the court will take judicial notice, and reference is here made to that portion of the *Geographic* Atlas of the United States designated as "Pocahontas folio."

Third. That complainants cannot claim protection for the exclusive use of a trade-mark or trade name, which would practically give them a monopoly in a great geographical section in the sale of coal other than that handled by them; that if they could, the public would be injured rather than protected, for competition would thereby be destroyed; that such trade-mark cannot consist of words in common use, as designating locality, section or region of country.

Fourth. That words in common use are the common property of the people, and no one can acquire an exclusive right to such a word by adopting it as a trade-mark; especially is this applicable to geographical names.

Fifth. That the word "Pocahontas" is now used, and has been for many years, as identifying a class of coal in that vast coal region; that it is a word in use by the whole commercial world as descriptive of all the coal in that section: it belongs to the trade.

183 Sixth. That from the force of necessity, as well as for the information of the trade at large, the word "Pocahontas" is absolutely essential to, and inseparably connected with, the marketing of the products of that vast field, and for years past this name has been used, and every year increased in use, without objection, by every institution connected with the field, and its use has assumed such proportion as cannot now possibly be controlled.

Seventh. That the word "Pocahontas," as claimed by the complainants as a trade-mark, has been allowed to be used by individuals and corporations and various institutions all over the country, until they are estopped from now attempting to monopolize the name "Pocahontas" as a trade-name.

Eighth. The complainants failed to show any priority of right to the trade name or mark claimed by them. Their right to it having been positively denied by petitioner in his answer.

Ninth. Petitioner denied all fraud of every kind whatsoever charged in the bill and none was proven.

Tenth. It is shown by the proof and pleadings that the complainants are attempting to monopolize the coal trade of that vast section, to suppress competition, and to force all the collieries of that section to employ them as agents.

Eleventh. The record discloses the fact that the complainants themselves had assumed and used the name "Pocahontas" (which they claimed as a trade-mark), long prior to their pretended purchase from the Southwest Virginia Improvement Company.

Twelfth. The trade name granted by the decree to the complainants as a historical and geographical name, common to the world, and is not a fanciful name originated by the complainants. The word "Flat Top," which was appended by the decree to the trade name of the complainants, was not sought by them in their bill, and is derived from a mountain of that name, which has been a geographical name for a century.

Thirteenth. The complainants falsely allege that they had acquired the right to use the name "Pocahontas" on account of a peculiar mode of inspection of the product handled by them. Inspection of no kind can change the inherent character of the coal, and would give them no prior claim to use the trade-mark for raw material; besides, it is shown that the inspection simply consisted in the elimination of foreign substances from the coal, which kind of inspection is common to mines everywhere, and especially to the mines in that section, as shown by the record; and it is
184 further shown that the same kind of inspection and care has been exercised by the producers from whom petitioner is purchaser.

Fourteenth. Complainants for years have been selling the same coal which they now complain of your petitioner selling as "Pocahontas" coal.

For these errors assigned as well as for others which will be assigned at bar, your petitioner prays for an appeal from the said decree of May the 5th, 1897, in said cause to the United States circuit court of appeals for the fourth circuit.

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Your petitioner further prays that the said decree of the 5th of May, 1897, be reviewed and reversed by the United States circuit court of appeals for the fourth circuit, and he prays for the whole cause to be reviewed and reversed by the said last-mentioned court for the errors above assigned, and for other errors plainly appearing in the record of said cause, which have not been specifically assigned.

Your petitioner further prays that your honor make a proper order granting his appeal without *supersedeas*, and that you sign a proper citation requiring the complainants to show cause, if any there be, why the decree rendered against this petitioner in said cause should not be reversed and corrected, and why speedy justice should not be done your petitioner in that behalf. And, as in duty, &c.

W. H. COFFMAN,
Doing Business under the Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant, by Counsel.

HENRY & GRAHAM,
Tazewell, Va., of Counsel for W. H. Coffman.

(Endorsed:) In the circuit court of the United States for the district of West Virginia. Samuel Castner, Jr., and Henry B. Curran, copartners, trading under the firm name and style of Castner & Curran, complainants, *vs.* W. H. Coffman, doing business under the name and style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, defendant. In equity. Filed in open court 27th day of May, 1897. L. B. Dellicker, clerk.

185 Bond on appeal as required by and mentioned in said order granting same was duly given, which bond is in the words and figures following, to wit:

Know all men by these presents, that we, William H. Coffman, as principal, and S. T. Litz and W. P. Payne, as sureties, are held and firmly bound unto Samuel Castner, Jr., & Henry B. Curran, copartners, trading under the firm name and style of Castner & Curran, in the full and just sum of five hundred dollars, to be paid to the said Samuel Castner, Jr., & Henry B. Curran, partners as Castner & Curran, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, lately at a circuit court of the United States for the district of West Virginia, at Charleston, in a suit depending in said court between Samuel Castner, Jr., & Henry B. Curran, copartners, under the firm name and style of Castner and Curran, complainants, and W. H. Coffman, doing business under the name and style of Pocahontas Coke & Coal Company, and W. H. Coffman Coke Company, defendant, a decree was rendered against the said W. H. Coffman, doing business under the name and style of Pocahontas

Coke & Coal Company, and W. H. Coffman Coke Company, defendant, and the said W. H. Coffman, doing business under the name and style of Pocahontas Coke & Coal Company and W. H. Coffman Coke Company, having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said Samuel Castner, Jr., & Henry B. Curran, copartners, trading under the firm name and style of Castner & Curran, citing and admonishing them to be and appear at a United States circuit court of appeals for the fourth circuit, to be holden at Richmond on the day in the said citation mentioned:

Now, the condition of the above obligation is such, that if the said W. H. Coffman shall prosecute his appeal to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM H. COFFMAN. [SEAL.]
S. T. LITZ, [SEAL.]
By S. C. GRAHAM,
His Attorney-in-fact.
W. P. PAYNE. [SEAL.]

186 Sealed and delivered in presence of—
L. B. DELLICKER.
L. B. DELLICKER.
L. B. DELLICKER.

Approved by—
J. J. JACKSON,
U. S. Dist. Judge.

(Endorsed:) Circuit court U. S., dist. W. Va. Filed in open court this 27 day of May, 1897. L. B. Dellicker, clerk.

The power of attorney under which the foregoing bond was executed is in the words and figures following, to wit:

Know all men by these presents, that whereas, there is a suit in equity now pending in the circuit court of the United States for the district of West Virginia, wherein Samuel Castner, Jr., and Henry B. Curran, copartners, trading under the firm name and style of Castner & Curran, are complainants, and W. H. Coffman, doing business under the name and style of Pocahontas Coal & Coke Company and W. H. Coffman Coke Company, is defendant; and, whereas, on the 5th day of May, 1897, a decree or order was rendered by said circuit court in said suit in equity, from which said decree or order the said W. H. Coffman desires to appeal, and in doing so the said W. H. Coffman will be required to give a bond to obtain such appeal. Now, therefore, in consideration of the premises, we, the undersigned, W. H. Coffman, S. T. Litz, James S. Browning, do hereby make and constitute S. T. Graham, of Tazewell, Tazewell county, Virginia, our attorney-in-fact to execute for us and in our stead any bond of any kind which may be required of the said W. H. Coffman in order to obtain any appeal from said decree or order in said equity suit, or to obtain any supersedeas to the opera-

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tion of said decree or order. We hereby empower the said S. C. Graham, our said attorney-in-fact, to make, execute, and acknowledge for us any such bond as herein provided for in the same manner, and to be as binding on us as if we, ourselves, had made, executed, and acknowledged the same, hereby ratifying and
187 approving all that our said attorney-in-fact may do. It is hereby further agreed that this power of attorney shall last and be in force for the purpose of executing any and all bonds that may be required until said appeal be heard and determined.

Witness our hands and seals this the 21 day of May, 1897.

W. H. COFFMAN. [SEAL.]
S. T. LITZ. [SEAL.]
—— ——. [SEAL.]

STATE OF WEST VIRGINIA, *County of Mercer,* } *To wit:*

I, W. F. Alexander, a notary public in and for the county of Mercer, in the State aforesaid, do certify that W. H. Coffman, S. T. Litz, whose names are signed to the foregoing writing, bearing date on the 21 day of May, 1897, having acknowledged the same before me in my county aforesaid.

Given under my hand and official seal this the 21 day of May, 1897.

[NOTARIAL SEAL.] W. F. ALEXANDER, *Not. Pub.*

STATE OF WEST VIRGINIA, *County of Mercer,* } *To wit:*

I, S. T. Litz, on oath do state that I am the same S. T. Litz who signed and acknowledged a power of attorney dated the 21st day of May, 1897, making and constituting S. C. Graham an attorney-in-fact, and I do further state on oath that I am worth at least the sum of four thousand dollars after the payment of all my debts; that my property consists of real estate principally, situated in the State of West Virginia and Virginia, and I am also the owner of personal estate. Given under my hand this the 25th day of May, 1897.

S. T. LITZ.

STATE OF WEST VIRGINIA, *County of Mercer,* } *To wit:*

Sworn to and subscribed before me in my county and State above set out. Given under my hand and official seal this 25th day of May, 1897.

[SEAL.] F. MOOMAU, *N. P.*

188 (Endorsed:) S. C. Graham from W. H. Coffman and others. Power of attorney. Circuit court U. S. dist. W. Va. Filed in open court this 27 day of May, 1897. L. B. Dellicker, clerk.

The citation is as follows.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Samuel Castner, Jr., and Henry B. Curran, copartners, trading under the firm name and style of Castner & Curran, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the fourth circuit, to be holden at Richmond on the 12th day of July next, pursuant to an appeal from a decree of the circuit court of the United States for the district of West Virginia, in your favor passed in a cause in said court wherein W. H. Coffman, doing business under the name and style of Pocahontas Coke & Coal Company and W. H. Coffman Coke Company, is defendant, and you are complainant-, to show cause, if any there be, why the decree rendered against the said defendant in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, this 12th day of June, in the year of our Lord one thousand eighth hundred and ninety-seven.

J. J. JACKSON,
Judge U. S. Dist. Court, District of W. Va.

Service accepted of the within citation to have the same effect as if served by marshal upon the appellees.

BROWN, JACKSON & KNIGHT,
Local Counsel for the Complainants and Appellees, Castner & Curran.

189 & 190 *Order to Transmit Record.*

And, thereupon, it is ordered by the court here, that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States circuit court of appeals for the fourth circuit, and the same is transmitted accordingly.

Teste: L. B. DELLICKER, *Clerk.*

Clerk's Certificate.

UNITED STATES OF AMERICA, *District of West Virginia,* } *ss:*

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do hereby certify that the foregoing is a true and complete transcript of the record in the chancery cause of Samuel Castner, Jr., & Henry B. Curran, copartners, &c., *vs.* W. H. Coffman *et al.*, now of record and on file in my office (except as noted on page 276 above, with reference to map Exhibit A).

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In testimony whereof, I have hereto set my hand and the seal of said court this 10th day of July, A. D. 1897, and the 122d year of the Independence of the United States of America.

Seal of the Court.

L. B. DELLICKER,
Clerk Circuit Court U. S., D. W. Va.

191 *Proceedings in the United States Circuit Court of Appeals, Fourth Circuit.*

W. H. COFFMAN, Doing Business under Name and Style of Pocahontas Coke and Coal Company, *et al.*, Appellant-, *vs.* SAMUEL CASTNER, JR., and HENRY B. CURRAN, Trading as Castner & Curran, Appellees.	No. 231. Appeal from Circuit Court United States, District of West Virginia, Charleston.

July 12, 1897, transcript of the record filed and cause docketed.

Same day appearance of S. C. Graham for the appellant, order filed.

July 16, 1897, appearance of Arthur v. Briesen and Henry E. Everding for the appellees, order filed.

September 28, 1897, twenty copies of the printed record filed.

October 22, 1897, certified copy of the injunction correcting the record filed as follows:

Certified Copy of Injunction.

At a circuit court of the United States for the District of West Virginia, continued and held at Charleston, in said district, on Wednesday, the 5th day of May, A. D. 1897, an order was made and entered of record, which order is in the words and figures following, to wit:

SAMUEL CASTNER, JR., and HENRY B. CURRAN, Copartners, Trading under the Firm Name and Style of Castner & Curran, Complainants, *vs.* W. H. COFFMAN, Doing Business under the Name and Style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.	In Equity.

This day came the complainants by their counsel, Arthur v. Brisen and Henry E. Everding, Esqs., and the defendant by his counsel, B. Mason Ambler and S. C. Graham, Esqs., and
192 thereupon the said defendant filed his demurrer to the bill of complaint which was set down for argument forthwith, and said demurrer being argued by counsel and considered by the court, is overruled. And, thereupon, this cause came on to be heard upon complainants' motion for an injunction in accordance with

the order heretofore entered in this cause on the 31st day of March, 1897, and thereupon the said defendant filed his sworn answer to the bill, and the following affidavits, to wit: Justus Collins, I. A. Welch, C. Botsford, Worth Kilpatrick, W. S. Cope and A. R. Paddock. And thereupon the complainants replied generally to said answer and filed the affidavits of F. J. Kimball and I. A. Welch in rebuttal.

And, thereupon, the said motion for an injunction being argued by counsel upon the bill of complaint and affidavits filed therewith, the sworn answer of the defendant and replication thereto, and the affidavits aforesaid, and considered by the court, it is adjudged, ordered and decreed as follows: That the defendant, in his own name and in the name of the Pocahontas Coke and Coal Company, and in the name of the W. H. Coffman Coke Company, and his servants, attorneys, associates, confederates, agents and workmen and each and every of them be and the same are restrained and inhibited from using the name "Pocahontas," or "Pocahontas Flat Top" in connection with his business, the court being of the opinion that the complainants have a right to use the said word "Pocahontas" for the purpose of indicating that the coal was from the Pocahontas field, and that the complainants have the sole right to use said word as indicating the character of coal they sell. But this injunction is not to restrain or inhibit the defendant or his agents from advertising, offering for sale, or selling coal from what is known in Virginia or West Virginia as the Pocahontas coal-field, *or advertising the coal as so mined and produced* from that field, and this injunction shall not apply to transactions of the defendant already concluded by actual shipment of coal.

UNITED STATES OF AMERICA, }
District of West Virginia, } *ss:*

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do hereby certify that the foregoing is a true copy of an order duly entered in the chancery cause of Samuel Castner, Jr., and Henry B. Curran, copartners trading under the firm name and style of Castner & Curran, complainants, *vs.* W. H. Coffman, doing business under the name and style of
193 Pocahontas Coke and Coal Company, defendant, on the 5th day of May, 1897.

In testimony whereof I have hereto set my hand and the seal of said court this 21st day of October, A. D. 1897,
Seal of the Court. and in the 122nd year of the Independence of the United States of America.

L. B. DELLICKER, *Clerk.*

November 8, 1897, (November term, 1897,) cause came on to be heard and was argued by counsel and submitted.

At the May term, 1898, to wit: May 3, 1898, the court announced and filed its opinion, which is as follows, to wit:

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Opinion.

United States Circuit Court of Appeals, Fourth Circuit.

W. H. COFFMAN, Appellant,
versus
SAMUEL CASTNER, JR., and Henry B. Curran, Appellees.

No. 231. In Equity. Appeal from the Circuit Court of the United States for the District of West Virginia.

(Argued November 8, 1897; decided May 3, 1898.)

Heard by Goff, circuit judge, and Brawley and Purnell, district judges.

S. C. Graham, of Henry & Graham, counsel for appellant; Arthur v. Briesen (J. Walker Douglass and Henry E. Everding, on brief), counsel for appellees.

GOFF, *Circuit Judge:*

This is an appeal from an order of the circuit court for the district of West Virginia, entered on the 5th day of May, 1897, in the chancery cause of Samuel Castner, Jr., and Henry B. Curran, trading under the firm name of Castner & Curran, against W. H. Coffman, doing business under the name and style of Pocahontas Coke and Coal Company, and also as W. H. Coffman Coke Co. By such
194 order the defendant below, appellant here, was in his own name and in the name of the Pocahontas Coke and Coal Company, and also as the W. H. Coffman Coke Company, together with his servants, attorneys and associates, restrained and inhibited from using the name "Pocahontas" or "Pocahontas Flat Top" in connection with his business, the court being of the opinion that "the complainants have a right to use the said word 'Pocahontas' for the purpose of indicating that the coal was from the Pocahontas field, and that they have the sole right to use said word as indicating the character of coal they sell." From this decree the defendant below, under the provisions of section 7, of the act approved March 3, 1891, entitled "An act to establish circuit court- of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," sued out this appeal.

The bill alleges that about the year 1882, in the State of Virginia, a tract or field of smokeless bituminous or semi-bituminous coal was opened and mined by the Southwest Virginia Improvement Company, a corporation organized and doing business under the laws of the State of Virginia; that shortly thereafter, but still in the year 1882, the said corporation named their mine "Pocahontas" and began selling the coal therefrom as "Pocahontas" coal having adopted the trade-mark "Pocahontas," as designating its said output; that prior to the first day of January, 1884, Castner & Co., Limited, a partnership formed under the laws of the State of Pennsylvania, did purchase from the said Southwest Virginia Improve-

ment Company the coal so mined, and did ship and sell the same principally at tidewater points under the name of "Pocahontas" coal; that they as such partnership association dealt in, inspected, shipped and sold from said region or field as "Pocahontas" coal in large quantities, and under the license of the Southwest Virginia Improvement Company advertised, shipped, and billed the same "Pocahontas" coal, uniformly designating it as such coal; that in the year 1889, the complainants became the successors and assigns of said Castner & Co., Limited, and continued the same business under the name of Castner & Curran, dealing in and selling large quantities of said coal under the trade-mark designation of "Pocahontas" coal, shipping, billing and advertising the same as "Pocahontas" coal, and as Flat Top coal, and that they by reason of careful inspection and purification of their coal greatly increased from year to year the sale of the same; that complainants and their predecessor Castner & Co., Limited, from the year 1883 unti
195 the bringing of this suit, during the first twelve years thereof with the license of the Southwest Virginia Improvement Company, and thereafter as owners of the said trade-mark uninterruptedly carried on said coal business, and have continuously inspected, shipped and sold large quantities of coal under the said trade-mark of "Pocahontas;" that on April 1, 1895, by an assignment in writing, duly executed by the Southwest Virginia Improvement Company, the complainants became the owners of the entire right and title, interest and good will in and to the trade-mark "Pocahontas," with the exclusive right to use said word as a designation for all coal thereafter sold by them from said field, and became vested also with the exclusive right to sue and recover for all gains, profits and damages arising out of past, present or future infringements of the same; that they have devoted much time and expended large sums of money in inspecting, selecting, grading and maintaining the superior quality and purity of the said coal, whereby it has acquired and now possesses a great reputation in the markets of the world under the name of "Pocahontas," or "Pocahontas" Flat Top coal, and that it has been and is now much sought after by dealers and the public; that complainants have the sole and exclusive right to the use of the word symbol "Pocahontas" as a trade-mark for coal, and that it is of great value to them in their business. It is also set forth in the bill that the public and the dealers in coal have generally acquiesced in complainants' exclusive rights to such use, and that they have not knowingly permitted the unlawful use of such trade-mark by others; that prior to November 1, 1896, complainants controlled the output of the various collieries in what is known as the "Great Flat Top coal region," including the Indian Ridge Coal & Coke Company; that they sold so much of this output as came up to the grade of "Pocahontas" coal in quantity, purity and size as "Pocahontas" coal, but that the output of the Indian Ridge Company was impure, and required special care and attention, and yielded but a small proportion of the "Pocahontas" coal, as it was marketed by complainants; that the defendant, W. H. Coffman, is a factor or agent engaged in the sale

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of coal and coke at Bluefield, West Virginia, and elsewhere, selling and advertising for sale bituminous and semi-bituminous coal from the Indian Ridge colliery, which is inferior in quality and purity to the coal sold by complainants, and is not of the standard as to quality and purity established by them; that he, intending to deceive dealers and the public, and to cause purchasers of his
196 coal to believe that the same was sold by complainants, or is of the quality sold by them, has at Bluefield and elsewhere offered for sale and sold a very inferior and impure coal under the name and designation of "Pocahontas," and has in advertising and selling the same used the word symbol "Pocahontas," and in letters, notes and bills has displayed the words "Pocahontas coal," or "Pocahontas" Flat Top coal, whereby the purchasers of his coal are liable to be, and will be deceived and caused to purchase defendant's coal as that sold by complainants, and that as a matter of fact purchasers have been so deceived, and that the reputation of "Pocahontas" coal has been thereby tainted; that the defendant intends to and will continue so to do, unless prevented by the order of the court below. Other statements in the bill are not referred to, the same being unnecessary so far as the questions we are now to consider are concerned. A large number of affidavits were filed by complainants and defendant, which as well as the answer of the defendant, treated as an affidavit, and the exhibits with it and the bill were read and considered by the court in disposing of the motion for an injunction.

Certain propositions of law, now well established, applicable to this case, will be referred to in the outset as guiding us in our investigation of the same, and as plainly indicating, in connection with the facts as we find them, the result we now announce. A trade-mark is intended to designate the origin of the particular article to which it is affixed, or to which it specially refers, and it gives notice to the world who the producer of that article was. A name may be used for this purpose, or a certain mark or peculiar device may be employed, provided they have not theretofore been appropriated by others for the same purpose. But the right to select such names, marks and devices is governed by certain rules and limitations which have been found and announced by the courts. On this point the Supreme Court of the United States, in *Canal Company vs. Clark*, 13 Wall., 311, 323, said: "The trade-mark must, therefore, be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association. And there are two rules which are not to be overlooked. No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients,
197 or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection. As we said in the well-considered case of *The Amoskeag Manufacturing Company*

vs. Spear, 'the owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbo's that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any word, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or symbol, which, from the nature of the fact it is used to signify, others may employ with equal truth, and, therefore, have an equal right to employ for the same purpose.'

"And it is obvious that the same reasons which forbid the exclusive appropriation of generic names or of those merely descriptive of the article manufactured and which can be employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names, designating districts of country. Their nature is such that they cannot point to the origin (personal origin) or ownership of the articles of trade to which they may be applied. They point only at the place of production, not to the producer, and could they be appropriated exclusively, the appropriation would result in mischievous monopolies. Could such phrases as 'Pennsylvania wheat,' 'Kentucky hemp,' 'Virginia tobacco,' or 'sea island cotton' be protected as trade-marks; could any one prevent all others from using them, or from selling articles produced in the districts they describe under those appellations, it would greatly embarrass trade, and secure exclusive rights to individuals in that which is the common right of many. It can be permitted only when the reasons that lie at the foundation of the protection given to trade-marks are entirely overlooked. It cannot be said that there is any attempt to deceive the public when one sells as Kentucky hemp, or Lehigh coal, that which in truth is such, or that there is any attempt to appropriate the enterprise or business reputation of another who may have previously sold his goods with the same description. It is not selling one man's goods as and for those of another. Nothing is more common than that a manufacturer sends his products to market, designating them by the name of the place where they were made. But we think no case can be found in which other producers of similar products in the same place have been restrained from the use of the same name in describing
198 their goods. * * * It is only when the adoption or imitation of what is claimed to be a trade-mark amounts to a false representation, express or implied, designed or incidental, that there is any title to relief against it. True it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words, already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not

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deceived by false representations, and equity will not enjoin against telling the truth."

In the same case it was held that the word Lackawana, the name of a section of the State of Pennsylvania, could not be combined with the word coal, and made a trade-mark which would be protected by law, for the reason that every one who mined coal in the valley of the Lackawana was entitled to the right of representing it as coming from that region and as being Lackawana coal.

In *Columbia Mill Co. vs. Alcorn*, 150 U. S., 460, 466, the Supreme Court says: "The appellant was no more entitled to the exclusive use of the word 'Columbia' as a trade-mark than he would have had to the use of the word 'America,' or 'United States,' or 'Minnesota,' or 'Minneapolis.' These merely geographical names cannot be appropriated and made the subject of an exclusive property. They do not, in and of themselves, indicate anything in the nature of origin, manufacture, or ownership; and in the present case the word 'Columbia' gives no information on the subject of origin, production, or ownership." In the same case it was said: "These cases establish the following general propositions: (1) That to acquire the right to the exclusive use of a name, device, or symbol, as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark must point distinctively, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed, as its primary object and purpose, to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. (2) That if the device, mark, or symbol was adopted or placed upon the article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid
199 trade-mark. (3) That the exclusive right to the use of the mark or device claimed as a trade-mark as founded on priority of appropriation; that is to say, the claimant of the trade-mark must have been the first to use or employ the same on like articles of production. (4) Such trade mark cannot consist of words in common use as designating locality, section, or region of country."

In *Laughman et al. vs. Piper et al.*, 128 Penn. S., 1; 5 L. R. A., 599, it was held that when the article to which a geographical name is applied is the product of the place named, the term cannot be used as a trade name by one to the exclusion of others, owners of like products of the same place; hence the term "Sonman," which has received a distinct geographical recognition from the public, it being the name of a large boundary of land containing a number of private estates owned by different persons, all of whom are engaged in the same business of mining and shipping coal, and having within its limits a village of the same name, cannot be appropriated by one of such persons as a trade name to the exclusion of the others, although the tract is not an independent region, and cannot be considered a separate coal basin or sub-basin.

In the case of *Glendon Iron Co. vs. Uhler*, 75 Pa., 467; 15 Amer.

Rep., 599, the court said: "Glendon is the name of the town in which the business of each party is located and carried on. It is an incorporated borough. Being then the name of an incorporated town, the main question is whether the appellant lawfully has the exclusive right to use it as a trade-mark. It is conceded as a general rule that the name of a town or city cannot be so appropriated as the exclusive property of any one. This view is well sustained by authority. High on Injunctions, 673; Bispham's Eq., 411; *Wolfe vs. Goulard*, 18 How. Pr., 64; *Brooklyn White Lead Company vs. Masury*, 25 Barb., 416; *Newman vs. Alvord*, 49 *id.*, 588; *Candee vs. Deere*, 54 Ill., 439; S. C., 5 Am. Rep., 125; *Del. & Hud. Canal Co. vs. Clark*, 13 Wall., 411.

"It is contended by the appellant that this case is taken out of the general rule, inasmuch as the trade-mark was adopted prior to the incorporation of the borough, and before there was any town at that place. No authority is cited which supports this distinction. The case of *Woterspoon vs. Currie*, 23 L. J. Rep., 443, is clearly distinguishable. It is known as the Glenfield Starch case. It is true the injunction was there granted; but the complainant and respondent were not both engaged in carrying on the same business in the same town or city. There was no town, no city there. The Lord Chancellor says: 'Glenfield is not a town, * * * it is not a parish, it is not a hamlet, it is not a district of any special character, but it was an estate of that name upon which some people seem to have erected some houses or manufactories, and upon which now some sixty people are living.' It will not do to apply to an incorporated borough in this State the same rule that may be applicable to an estate in England. Such a borough is essentially of a public nature; the estate is of a more private character. The name which an individual may give to his estate is unlike that which legislative sanction has given to a municipal corporation. The rights of the public in each are radically different.

"The appellee did not falsely represent the place of their business location. Their pig iron was actually manufactured within the borough of Glendon. * * * The appellees put upon their pigs the initials of their firm and the name of their town. That name was Glendon to the whole world. It cannot be that the previous appropriation by the appellants of the word which now is the name of the town prevents any other manufacturer of pig iron, within its limits, from using the same word. If it be so now it may continue through all coming time. The boundaries of the town may be enlarged. The borough may grow into a city. The manufactories of pig iron may be multiplied, yet the word most expressive to indicate their location must be denied to all save one * * * We see nothing in the facts of this case, even as found by the master, to take it out of the general rule which denies to one the exclusive use as a trade-mark of the name of the town in which the same kinds of goods are manufactured by others."

In *Connell vs. Reed*, 128 Mass., 477; S. C., 35 Am. Rep., 397, Chief Justice Gray says: "Although the master reports that there was no

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evidence that any other person than the plaintiffs or their agents had ever used these words ('East Indian') in connection with the manufacture and sale of medicines, it is at least doubtful whether words in common use as designating a vast region of country and its products can be appropriated by any one as his exclusive trade-mark, separately from his own or some other name in which he has a peculiar right." In the case of *Evans v. Von Lear*, 32 Fed., 153, Judge Colt held that as Montserrat was the name of an island in the West Indies from which both the plaintiff and defendant imported lime juice the former, in the absence of fraud, was not entitled to the exclusive use of the word "Montserrat" as a designation
201 for lime juice, even though the plaintiff's article may have acquired a high reputation for purity and strength, while that of the defendant was of an inferior quality.

In *Genessee Salt Co. vs. Burnap*, 73 Fed., 818; 20 C. C. A., 27, 43; U. S. App., 243, 250, the court said: "It is well settled, and we have just had occasion to decide in this court, that words merely descriptive of the character, quality, and composition of the article, or of the place where it is manufactured or produced, cannot be monopolized as a trade-mark. *California Fig Syrup Company v. Frederick Stearns & Company*, 43 U. S. App., 234; *Brown Chemical Company v. Meyer*, 139 U. S., 540; *Canal Company v. Clark*, 13 Wall., 311. The name 'Genessee,' when used in connection with the complainant's salt, obviously refers to the place of its production. The complainant could, therefore, assert no trade-mark property in it."

In the case of *Candee, Swann & Co. v. Deere & Co.*, 54 Ill., 439; S. C., 5 Am. Rep., 125, the court held that there can be no trade-mark in the words "Moline plows," as Moline was the name of the town in which the plows were made, and said: "Is it possible, can it be tolerated for a single moment, that a maker of plows at Moline shall not be permitted to sell his work as a Moline plow; to advertise them in every form as a Moline plow? Would it not be the truth, and shall a manufacturer be prevented from publishing to the world, where his wares are made? * * * Any number of plow-makers can go with impunity to Moline and establish there plow factories, and brand on their plows their own name and the name of the town, and send them broadcast over the county, to the joy of our farmers, and to the common benefit of all."

These cases firmly establish the questions of law applicable to the contention we are now to dispose of and they clearly indicate the result we have reached. A geographical name cannot be appropriated to the exclusive use of any person or company as a trade-mark, and if adopted as such, it must be used subject to the right of others doing business in the section of country to which it applies, to make like use of it in matters properly pertaining to their business in that locality.

It is clear from the evidence that Pocahontas is a word of well-known geographical signification, denoting that large and valuable section of the Virginias, famed the world over for the remarkably valuable and useful coal and coke that it produces. Prior to 1882, this region was comparatively unknown, and entirely in the prime-

val state in which nature had left it, constituting a part of
202 the great Flat Top Mountain portion of southwest Virginia and of southeast West Virginia. In the years immediately preceding 1882, this wilderness had been sought out and explored, by those who represented the capital and energy by which it was afterwards developed. The experts sent into its theretofore hidden recesses returned with the report of its fabulous wealth and wonderful possibilities. The result was the extension of the Norfolk & Western railroad into and through the Great Flat Top region, and the organization of the Southwest Virginia Improvement Company under whose auspices the mines were opened and coal was first shipped. The development inaugurated by this company was commenced during the fall of 1881, continued in the year 1882, and the railroad was completed to the mines in the springtime of the year 1883. The town located at the point where the first mine was opened was early in the year 1882 named Pocahontas, and the post-office which was established by the department at Washington on the 30th day of June, 1882, was likewise then called by the same name. The first coal shipped to the tidewater markets left the mines in July, 1883, and it was billed and sold as "Pocahontas coal."

The entire field is now known as the "Pocahontas" and the "Pocahontas Flat Top coal-field." It embraces large portions of Tazewell and Wise counties in the State of Virginia, and of Mercer, McDowell, Wyoming and Raleigh counties in the State of West Virginia. It is divided into three sections, or working divisions: the Pocahontas, which includes all the mines around the town of Pocahontas; the Bluestone district, embracing the improvements on the Bluestone river; and the Elkhorn, the country in McDowell county on the Flat Top mountain. The coal shipped from all this section, is known in the markets of the world as "Pocahontas coal," evidently so called from the town of that name in which the first mine was located, and from which the first shipments were made. The coal-beds are above the water level and range from five to thirteen feet in thickness, extending through an area of about five hundred square miles, or three hundred and twenty thousand square acres. An actual survey of the outcrop of this field discloses that about one-third of the territory is barren, and that there are near two hundred and thirteen thousand square acres underlaid with the Pocahontas vein of coal. A moderate estimate gives to each square acre 10,000 tons of marketable coal, or say two billion one hundred and thirty million tons. At the time when this suit was instituted thirty-eight different coal and coke companies were operating in the field all of
203 them advertising, mining and selling the coal excavated from the Pocahontas vein, and known as the "Pocahontas Flat Top coal." For the manufacture of coke over five thousand ovens had been constructed, and were in use. During the year 1883 ninety-nine thousand eight hundred and seventy-one tons were mined, the output in the following years rapidly increasing, until in 1894, three million eight hundred and eighty-eight thousand and fifty-eight tons were sent to market. For the pur-

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pose of illustrating the almost inexhaustible resources of the field, it may be stated that at this rate of production—as shown by the returns for the year 1894—it would require about five hundred and forty-eight years to exhaust the seam now being worked. And it is as to this entire body of coal that the complainants claim the exclusive right to use the word "Pocahontas" as descriptive of its origin and quality.

There is no evidence to sustain the allegation in the bill that the Southwest Virginia Improvement Company began selling coal in the year 1882 from the Pocahontas mine, nor that it made any sales of "Pocahontas coal" in the year 1883, in the sense that those words are used in as a trade symbol. Nor is there any satisfactory evidence tending to show that said company adopted and used a trade-mark, or made any effort to establish one as such, prior to the year 1885. It is true that in the assignment made by the Southwest Virginia Improvement Company to the complainants, it is recited that said company "did adopt on or about the first day of July, 1882, as a trade-mark, the word symbol 'Pocahontas,'" but surely that statement, in such a paper, made under the date of April 1, 1885, cannot be considered as proving that fact, and the record has been searched in vain for testimony establishing it.

The first coal sent to market, according to the evidence, was in July, 1883, at which date both the town of Pocahontas and the post-office of the same name had been in existence for a year at least. The claim of complainants that the town had no existence until January 31 1884, the date of the act of the Virginia legislature incorporating it, and that, therefore, it was not known legally, in a geographical sense, prior to such date, is not, in the light of the testimony, and in connection with the important questions herein involved, entitled to the consideration given it by counsel. There can be no doubt but that at the time the first shipment of coal was made by the Southwest Virginia Improvement Company, the town
of Pocahontas was in existence, the post-office had been estab-
204 lished, and that the coal itself was sent from the station of
that name. The word "Pocahontas" then denoted the locality at which the article in which the company was dealing was mined, as well as the point from which it was shipped, and it also indicated in business matters the natural product of all that region. It follows, therefore, that it could not then be used as an exclusive trade-mark; and as a matter of fact, it was not so employed until some time thereafter. We are impelled to find from the testimony that in the early shipments of coal the word Pocahontas was used, not as a word symbol or trade-mark, but simply as the name of the town from whence it came, for the purpose only of pointing out the place of production. The coal had not then been used, and it had not produced the wonderful results that it subsequently did; its reputation had not been made, and it had not at that time found its way to the marts of the world, to the furnaces of land and sea. The operators of that section, and their vendees, including complainants' predecessors, had not then been given the opportunity to inspect, grade and purify it, so as to make it typify the high degree

of excellence that it now enjoys, and there is no evidence tending to show that selection and inspection were then resorted to, other than is usual in all mines. The first direct evidence bearing on the trade-mark is the application of August 25, 1885, made by Castner & Company (Limited) to register the word "Pocahontas" at the United States Patent Office. Such registered trade-mark is not now relied upon by complainants, why we have not been advised, but likely for reasons connected with the decision of the Supreme Court in the *Trade-mark cases*, 100 U. S., 82. It is, however, worthy of notice that such application was made under the provisions of sec. 4937, Rev. Stat. of the United States, which require the party so applying to set forth in the statement made by him the length of time, if any, during which the trade-mark had been in use, and that said applicants in their statement so filed used this language: "This trade-mark has been used continuously by said corporation since about January 1, 1885." The word symbol, or device now claimed by complainants, as a trade-mark, is founded on the rule of the common law that the person or company first employing it to distinguish the goods made or sold by the owner thereof, is entitled to the benefits arising from its exclusive use. The chancery courts of England and of this country have long recognized this privilege, and have enforced it, if the property right of the claimant thereto has been duly established.

205 As we see this case, the complainants are not entitled to the *exclusive* right to use the word "Pocahontas," as descriptive of either the locality, or character of the coal mined in the "Pocahontas coal field," but all of the producers of that product in that section have the right to so use it in common with complainants. That word has acquired a generic meaning, and from the evidence before us it is clear that, in the business world, it is used to indicate the place where the coal is produced, and that it does not point to either the producer or the vendor of the same. All the mine-owners who by their labor succeeded in establishing their industries in that section, have the right to use in their business the geographical word which is the recognized designation of the same, and that points to the product peculiarly indicative of its wealth; and surely it cannot be that any one of them can inhabit all the rest from exercising the privilege, which was the birth-right of the section, and is an advantage common to all who are interested in it. To give to the complainants below the exclusive right they claim in their bill, would be to ignore the principle that is the foundation of the protection given to trade symbols and marks.

There remains yet one other allegation of complainants' bill to be considered, and that is the charge that the defendant below, intending to deceive dealers in coal and the public in general, unlawfully offered for sale and sold, a very inferior article of coal under the name of "Pocahontas;" that purchasers of the same were liable to be and were misled, and were induced to buy it as the superior and select grade usually sold by the complainants; and that thereby the public was deceived and the reputation of the coal sold by complainants was injured. It is undoubtedly true that complainants,

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as producers and sellers of coal from the "Pocahontas coal-fields," are with all other producers and mine operators in that region interested in maintaining the purity and reputation of the natural product of the same, and that they may cause the defendant or any one else to be inhibited and restrained from selling, or offering to sell, an inferior coal from another region, as the coal mined in the Pocahontas field. This they can do independent of the question of trade-mark, or of their right to the exclusive use of one.

This allegation that the defendant has been engaged in unfair and fraudulent trade, is not supported by the evidence. It has been shown that he was advertising and selling "Pocahontas coal," but the testimony also shows that the coal he so advertised and sold was in fact from the "Pocahontas coal-field." It follows that the representations made by him were neither fraudulent nor
206 untrue, and that he had a lawful right to so advertise and sell. It nowhere appears that he ever represented to the public that he was selling the same article sold by complainants, except as their coal was comprehended by the word Pocahontas, which also justly described his own. He sold the product of the Browning mine, which is located adjoining the original mine of the Southwest Virginia Improvement Company, in the town of Pocahontas, the coal from which is now disposed of by the complainants, as "Pocahontas coal," and it is proven that both collieries excavate from the same vein. As to the right of the Browning mine, one of the oldest in the field, to sell its product as "Pocahontas coal," there can be no doubt, and it would be unconscionable to deny it. He also sold from the Indian Ridge mine, which is located within the "Pocahontas coal-field," and it is shown that the complainants are now selling the output of the Rolfe and Arlington mines, as "Pocahontas coal," both of which adjoin the Indian Ridge mine. The complainants themselves formerly sold the coal from this mine as "Pocahontas coal," and it is really difficult to understand why it becomes another article in the hands of the defendant. It is also set forth in the bill that the coal from the Indian Ridge section does not grade as high as that from other portions of the field, and that it had not been carefully inspected by the defendant before it was sold. But the evidence does not sustain this claim, and it appears that the complainants themselves have endeavored to again secure the right to sell this coal, as "Pocahontas coal," since it has been so sold by the defendant, and we cannot believe that they would have made this effort had the grade of the product been inferior, or its inspection careless.

The proof does not show that the appellant has practiced any deception upon the public, or that he has perpetrated any fraud upon the appellees. The appellant advertised and was selling coal obtained from the Browning and Indian Ridge mines, of the "Pocahontas Flat Top region," and he did not represent it as purchased from the appellees, nor as mined by them. He has represented it as coal from the Pocahontas field, and it was in fact such coal. He has made no false representations, and he has invaded no right to which the appellees can properly assert a claim. There is error in

the decree appealed from, and it is reversed, and this cause is remanded to the court below with instructions to dismiss the bill.

Reversed.

At the same term, to wit: May 5, 1898, the court made and entered the following decree, to wit:

207 *Decree.*

United States Circuit Court of Appeals, Fourth Circuit.

W. H. COFFMAN, Trading as "Pocahontas Coke and Coal Company," *et al.*, Appellant-, *vs.* SAMUEL CASTNER, JR., and HENRY B. CURRAN, Trading as Castner & Curran, Appellees.	No. 231. Appeal from the Circuit Court of the United States for the District of West Virginia.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of West Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, reversed, with costs; and this cause is remanded to the circuit court of the United States for the district of West Virginia, at Charleston, with instructions to dismiss the bill. It is further ordered that the mandate of this court issue after the expiration of twenty days from the date hereof.

NATHAN GOFF,
Circuit Judge.

May 5, 1898.

Afterwards, at the same term, to wit: May 16, 1898, the appellees, by Richard C. Dale and Henry E. Everding, their solicitors, presented to the court here their petition for a rehearing, which is as follows, to wit:

Petition for Rehearing.

United States Circuit Court of Appeals, Fourth Circuit. In Equity.

W. H. COFFMAN, Appellant, *vs.* SAMUEL CASTNER, JR., and HENRY B. Curran, Appellees.	No. 231. Appeal from the Circuit Court of the United States for the District of West Virginia.

To the honorable the judges of the United States circuit court of appeals in and for the fourth circuit.

208 Your petitioners, Samuel Castner, Jr., and Henry B. Curran, the above-named appellees, respectfully show unto your honors:

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First. That on the third day of May, 1898, an opinion in the above-entitled cause was handed down by this court, wherein, amongst other things, it was held that—

"*There was error in the decree appealed from, and it is reversed, and this cause is remanded to the court below with instructions to dismiss the bill.*"

Second. That the decree appealed from and above referred to in the opinion of the court was an interlocutory decree granting a preliminary injunction upon pleadings and *ex parte* affidavits, and not a final decree based upon pleadings and proofs.

Third. That in the opinion of this court it was held in substance that the appellees, who were the complainants below, failed to prove material allegations of their bill of complaint, and for that failure the decree appealed from was reversed and the cause remanded, with instructions to dismiss the bill.

Fourth. That your petitioners are prepared to exhibit to this court and to the court below, upon final hearing, further proofs in support of all the aforesaid material allegations of their bill of complaint.

Fifth. That a decision upon the merits of this cause can only be arrived at on the final hearing upon full pleadings and proofs.

Wherefore your petitioners humbly pray that your honors may grant a rehearing of the above-entitled cause, in order that the mandate which shall issue from your honorable court to the circuit court for the district of West Virginia shall, after reversing the order therein entered granting a preliminary injunction, direct that the parties shall proceed to take their proofs in order that the cause may thereafter be heard upon pleadings and proofs, to the end that a final decree may be entered.

And your petitioners will ever pray, &c.

SAMUEL CASTNER, JR.,
HENRY B. CURRAN.

Dated Philadelphia, Pa., May 12th, 1898.

We respectfully certify that in our opinion the foregoing
209 petition is sufficient in law and in fact to warrant the grant of a rehearing, if this honorable court shall deem it meet.

RICHARD C. DALE,
HENRY E. EVERDING,
Of Counsel for Appellees and Petitioners, Samuel Castner, Jr., and Henry B. Curran.

Whereupon, afterwards, to wit: May 19, 1898, the court made and entered the following order, to wit:

Order Denying Rehearing.

United States Circuit Court of Appeals, Fourth Circuit.

W. H. COFFMAN, Appellant, *vs.* SAMUEL CASTNER, JR., HENRY B. Curran, Appellees. } No. 231. Appeal from the Circuit Court of the United States for the District of West Virginia.

Petition for rehearing.

Richard C. Dale, Henry E. Everding, counsel for appellees and petitioners.

GOFF, *Circuit Judge:*

The court has duly considered this petition for a rehearing, and it is ordered that the mandate issue as heretofore directed. The opinion filed in this cause on the 3rd day of May, 1898, found error in the decree appealed from, not, as stated in the petition for a rehearing, solely because the complainants below had failed to prove material allegations of their bill of complaint, but also because the court found that the word "Pocahontas" could not be exclusively appropriated by complainants as a "trade-mark," or "word symbol," for the reason that it was and is a geographical word, in and to which all the people of the section of country to which it refers have the common right of use in connection with their business in such locality. It follows, therefore, that further proofs relating to the same would be unavailing, and it was for this reason that the court remanded the cause, with instructions that the bill be dismissed. The ruling is adhered to. We are clearly of the opinion, not only that complainants below are not entitled to an injunction,
210 but also that there is no equity in their bill, and that, therefore, it will be a useless expenditure of time and money, and cause fruitless delay, to take the evidence mentioned in the petition for a rehearing.

The prayer of the petition is refused.

NATHAN GOFF,
Senior Circuit Judge Presiding.

May 19, 1898.

And, thereupon, afterwards, to wit: May 26, 1898, the mandate of the court was issued and transmitted to the circuit court of the United States for the district of West Virginia, at Charleston, in the following words, to wit:

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Mandate.

UNITED STATES OF AMERICA, *ss:*

Seal of the Court.

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of West Virginia, Greeting:

Whereas, lately in the circuit court of the United States for the district of West Virginia, before you, or some of you, in a cause between Samuel Castner, Jr, and Henry B. Curran, copartners trading under the firm name and style of Castner & Curran, complainants, and W. H. Coffman, doing business under the name and style of Pocahontas Coke and Coal Company, and W. H. Coffman Coke Company, defendant, wherein the decree of the said circuit court entered in the said cause on the 5th day of May, 1897, is in the following words, to wit:

"This day came the complainants, by their counsel, Arthur v. Brisen and Henry E. Everding, Esqs., and the defendant by his counsel, B. Mason Ambler and S. C. Graham, Esqs., and thereupon the said defendant filed his demurrer to the bill of complaint which was set down for argument forthwith, and said demurrer being argued by counsel and considered by the court, is overruled. And, thereupon, this cause came on to be heard upon complainants' motion for an injunction in accordance with the order heretofore entered in this cause on the 31st day of March, 1897, and thereupon the said defendant filed his sworn answer to the bill, and the following affidavits, to wit: Justus Collins, I. A. Welch, C. Botsford, Worth Kilpatrick, W. S. Cope and A. R. Paddock. And thereupon the complainants replied generally to said answer and filed the affidavits of J. F. Kimball and I. A. Welch in rebuttal.

211 And, thereupon, the said motion for an injunction being argued by counsel upon the bill of complaint and affidavits filed therewith, the sworn answer of the defendant and replication thereto, and the affidavits aforesaid, and considered by the court, it is adjudged, ordered and decreed as follows: That the defendant, in his own name and in the name of the Pocahontas Coke and Coal Company, and in the name of the W. H. Coffman Coke Company, and his servants, attorneys, associates, confederates, agents and workmen and each and every of them be and the same are restrained and inhibited from using the name 'Pocahontas,' or 'Pocahontas Flat Top' in connection with his business, the court being of the opinion that the complainants have a right to use the said word 'Pocahontas' for the purpose of indicating that the coal was from the Pocahontas field, and that the complainants have the sole right to use said word as indicating the character of coal they sell. But this injunction is not to restrain or inhibit the defendant or his agent from advertising, offering for sale, or selling coal from what is known in Virginia or West Virginia as the Pocahontas coal field, or advertising the coal as so mined and produced from that field, and this injunction shall not apply to transactions of the defendant

already concluded by actual shipment of coal, as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals, for the fourth circuit by virtue of the appeal of the said W. H. Coffman, trading as aforesaid, agreeably to the act of Congress, in such case made and provided, fully — at large appears.

And, whereas, in the term of November, in the year of our Lord one thousand eight hundred and ninety-seven, the said cause came on to be heard before the said United States circuit court of appeals for the fourth circuit, on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court, in this cause be, and the same is hereby, reversed, with costs; and this cause is remanded to the circuit court of the United States for the district of West Virginia, at Charleston, with instructions to dismiss the bill.

It is further ordered that the mandate of this court issue after the expiration of twenty days from the date hereof.

NATHAN GOFF,
Circuit Judge.

May 5, 1898."

212 You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the twenty-sixth day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

HENRY T. MELONEY,
Clerk of the U. S. Circuit Court of Appeals for the Fourth Circuit.

Costs of Appellant.

Clerk	$35 95
Printing record	278 00
Attorney	20 00
	$333 95

Clerk's Certificate.

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the aforegoing is a true copy of the entire record in the therein entitled cause, as the same remains upon the records and files of the said circuit court of appeals.

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Seal United States Circuit Court of Appeals, Fourth Circuit.

In testimony whereof I hereto set my hand and affix the seal of the United States circuit court of appeals for the fourth circuit, at Richmond, on this 21st day of November, A. D. 1898.

HENRY T. MELONEY,
Clerk U. S. Cir. Ct. Appeals.

213 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fourth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which W. H. Coffman, doing business under the name and style of Pocahontas Coke & Coal Company and W. H. Coffman Coke Company, is appellant and Samuel Castner, Jr., and Henry B. Curran, trading under the firm name and style of Castner & Curran, are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the district of West Virginia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals

214 and removed into the Supreme Court of the United States, do hereby command you that you send, without delay, to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

215 [Endorsed:] Supreme Court of the United States. No. 370. October term, 1898. Castner & Curran *vs.* W. H. Coffman, &c. Writ of certiorari, received Nov. 2, 1898. The execution of the within writ appears from the certified transcript of the record hereunto annexed. Henry T. Meloney, cl'k U. S. cir. ct. of appeals, 4th circuit.

Endorsed on cover: Case No. 16,955. Supreme Court U. S., October term, 1898. Term No., 370. Samuel Castner, Jr., *et al.*, petitioners, *vs.* W. H. Coffman, doing business as Pocahontas Coke & Coal Co., &c. Writ of certiorari and return. Filed November 22, 1898.

6518

No. 370 October Term, 1898.

Supreme Court of the United States.

SAMUEL CASTNER, JR., AND HENRY B. CURRAN, PETITIONERS.

Supreme Court, U. S.
FILED
AUG 18 1898
JAMES H. McKENNEY,
CLERK.

In re petition for a writ of *certiorari* requiring the Circuit Court of Appeals in and for the Fourth Circuit to certify to the Supreme Court for review and determination the case of Samuel Castner, Jr., and Henry B. Curran, co-partners, doing business under the firm name and style of Castner & Curran, Appellees,

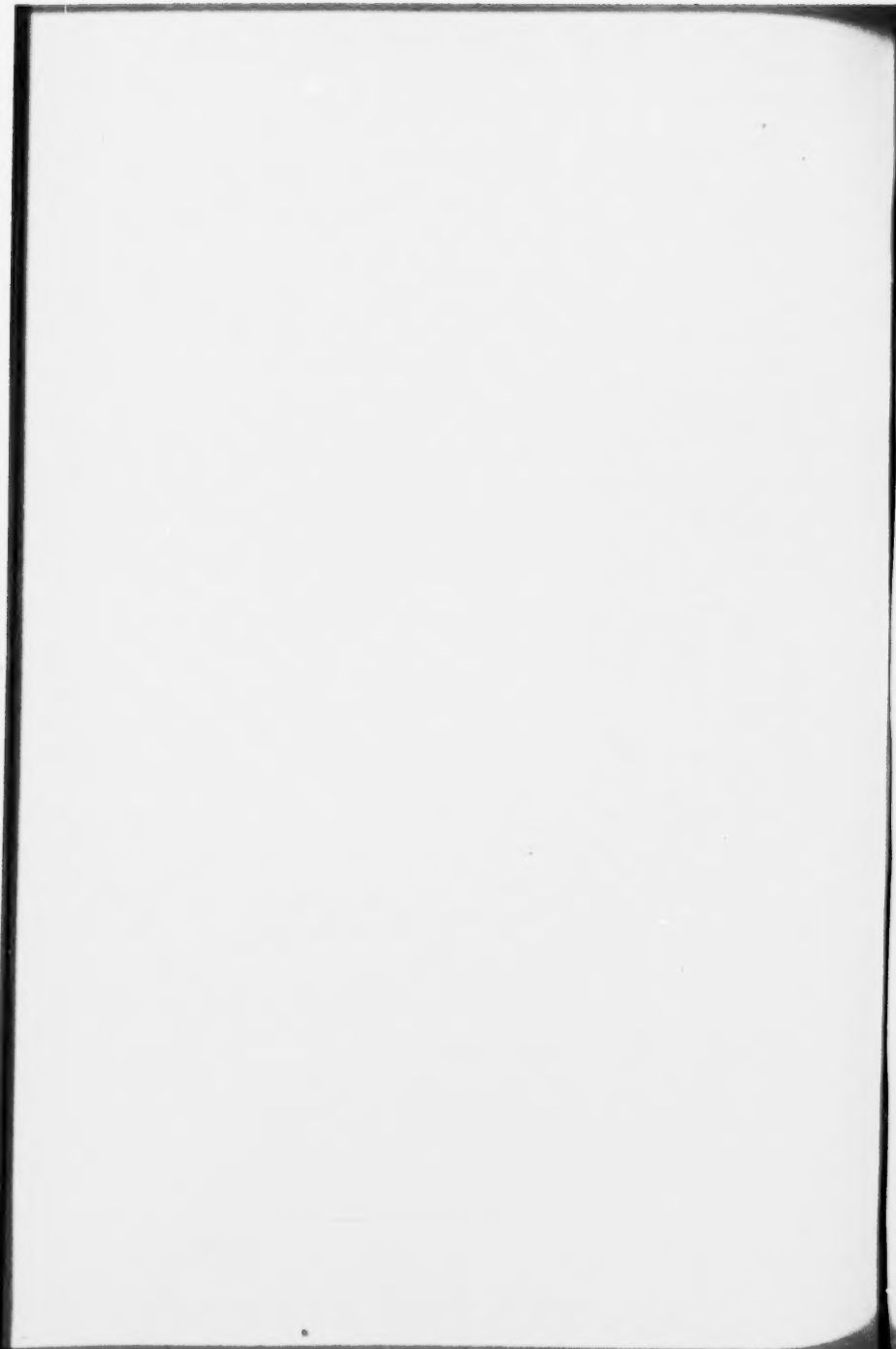
vs.

W. H. Coffman, doing business under the name and style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Appellant.

NOTICE OF MOTION, MOTION AND PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FOURTH CIRCUIT.

ARTHUR v. BRIESEN,
HENRY E. EVERDING,
Attorneys and Counsel for Petitioners.

Allen, Lane & Scott, Prs., Phila.



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Supreme Court of the United States.

Samuel Castner, Jr., and Henry B. Curran, copartners, trading under the firm name and style of Castner & Curran, Petitioners,	October Term, 1898.
vs.	No. .
W. H. Coffman, doing business under the name and style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company.	

NOTICE OF MOTION.

To Mr. W. H. Coffman, the above-named Defendant:

Please take notice that on Monday, October 17th, 1898, at the opening of the court on that day, or as soon thereafter as counsel can be heard, a motion for a writ of *certiorari*, of which motion a copy is annexed, will be submitted to the Supreme Court of the United States at the city of Washington, D. C., for the decision of the court thereon.

In support of said motion a petition and a brief will also be presented to the court. A copy of the petition and of the brief are herewith served upon you.

Respectfully,

HENRY E. EVERDING,
ARTHUR v. BRIESEN,
Attorneys and of Counsel for Petitioners.

Philadelphia, July 27th, 1898.

Due service of the foregoing notice of motion in the above cause is hereby admitted, this day of , 1898.

Defendant.

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SUPREME COURT OF THE UNITED STATES.

Samuel Castner, Jr., and Henry B. Curran, copartners, trading under the firm name and style of Castner & Curran, Petitioners,	October Term, 1898.
vs.	No. .
W. H. Coffman, doing business under the name and style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company.	

MOTION.

And now come Samuel Castner, Jr., and Henry B. Curran, the above-named petitioners, by Arthur v. Briesen and Henry E. Everding, their advocates and counsel, and move this Honorable Court for a writ of *certiorari*, directed to the Honorable the Judges of the Circuit Court of Appeals within and for the Fourth Judicial Circuit, commanding them forthwith to certify and return to this court all proceedings by them had in the suit lately before them, wherein these petitioners were appellees and W. H. Coffman was appellant.

The matter involved herein relates to the question of trade-mark rights of the petitioners in and to the name or symbol "Pocahontas" as applied to coal, which trade mark your petitioners own, and which the defendant has wrongfully appropriated. Your petitioners' right to said trade mark has been denied in the present case by the United States Circuit Court of Appeals for the Fourth Judicial Circuit, which has ordered the dismissal of petitioners' bill of complaint, but said right has been sustained by the United States Circuit Court of Appeals for the First Judicial Circuit, in a suit by your petitioners against W. C. Atwater & Co., one of the customers and privies of the said defendant, and this latter court rendered its de-

cision with full knowledge of the conclusions reached by the court in the Fourth Judicial Circuit.

SAMUEL CASTNER, JR., and
HENRY B. CURRAN,
Petitioners,

By
HENRY E. EVERDING,
ARTHUR v. BRIESEN,
Their Advocates and Counsel

Due service of the foregoing motion is hereby admitted, this day of , A. D. 1898.

Defendant.

SUPREME COURT OF THE UNITED STATES.

No. . October Term, 1898.

Samuel Castner, Jr., and Henry B. Curran, Petitioners, In re *petition for a writ of* certiorari, *requiring the Circuit Court of Appeals in and for the Fourth Circuit to certify to the Supreme Court for review and determination the case of Samuel Castner, Jr., and Henry B. Curran, copartners, doing business under the firm name and style of Castner & Curran, Appellees,*

vs.

W. H. Coffman, doing business under the name and style of Pocohontas Coke and Coal Company and W. H. Coffman Coke Company, Appellant.

To the Honorable the Supreme Court of the United States:

The petition of Samuel Castner, Jr., and Henry B. Curran respectfully shows:—

I. That petitioners are residents and citizens of the State of Pennsylvania, and the defendant is a resident and citizen of the State of West Virginia.

II. That the amount in controversy in the above-entitled cause, as appears by the bill of complaint (page 6 of Record), is in excess of the sum of $10,000.

III. That this suit was brought to restrain the said defendant, W. H. Coffman, from infringement of petitioners' trade mark "Pocahontas" as applied to coal.

IV. That the petitioners derived title to this trade mark by an assignment under date of April 1st, 1895, from the South-West Virginia Improvement Company to your petitioners. (Pages 12 to 14, Record.)

V. That the undisputed facts relating to the adoption and use of "Pocahontas" as a trade mark for coal by the South-West Virginia Improvement Company, may be briefly stated as follows:—

In the year 1881 the tract of land in which the coal is now mined was an unexplored wilderness (see Record, pages 176, 177); that the only name given to the region at that time and for years afterward was the Great Flat Top Region (page 177, Record); that during the years 1881 and 1882 the South-West Virginia Improvement Company developed this wilderness, opened coal mines, built many houses for the reception of its employees, and in other ways converted the wilderness into a hive of industry (page 177, Record); that during the year 1882 the said South-West Virginia Improvement Company adopted the name or symbol "Pocahontas" as a trade mark for its output of coal (page 15, Record); that the town near which the mines of the South-West Virginia Improvement Company were located was built and owned by the said company, and was called "Pocahontas" by said company after the adoption of the name as a trade mark (page 15, Record); but said town was not incorporated and had no legal existence until January 31st, 1884, when by Act of the Legislature of Virginia it was so incorporated (see Act of Incorporation, pages 70–75, Record); that long after the coal of the South-West Virginia Improvement Company had become well established and known in the markets of the world as "Pocahontas" coal, the region from which it comes was colloquially named the Pocahontas Coal Field; that prior to the opening of the mines of the South-West Virginia Improvement Company, coal was not known to exist in any quantity in this region, and being a wilderness, remote from railways, and without even carriage or wagon roads, and practically without population, this section of the country had no distinctive designation or geographical name. (See page 176, Record.)

VI. That the record shows that after the adoption and use of the trade mark "Pocahontas" by the said South-West Virginia Improvement Company, and in the year 1884, Castner

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& Co., Limited, the predecessors of petitioners, purchased, inspected, and purified the coal mined by said South-West Virginia Improvement Company and shipped and sold said inspected and selected coal, principally at tidewater points, under the name of "Pocahontas" coal; that thereafter, about the year 1889, the petitioners succeeded to the business of said Castner & Co., Limited, and became the sole agents and licensees of the said South-West Virginia Improvement Company in the sale of coal mined by said company, which coal was uniformly inspected, selected, and sold for twelve years by the petitioners and their predecessors with the license and permission of the said South-West Virginia Improvement Company as "Pocahontas" coal; and that since the assignment of the said trade mark in 1895 the petitioners, as owners of said trade mark, have continuously inspected, selected, and sold coal under the said trade mark or name of "Pocahontas." (See pages 3, 4, Record.)

VII. That the inspection, selection, and grading of their coal prior to its sale under the name of Pocahontas was and is necessary to preserve to the coal a uniform and standard quality, and involves the expenditure yearly of many thousands of dollars and the employment of from one to two hundred men (page 42, Record); and that in this inspection, selection, and grading the men employed are under the control of petitioners, and are compelled by petitioners to observe many rules and regulations, as appears by said rules and regulations, which are printed *in extenso* at pages 42–45, inclusive, of the record.

VIII. That by reason of their care in the selection, inspection, and grading of their coal, and an enormous outlay of money in the advertising for sale and in the selling of their coal as "Pocahontas" coal, these petitioners have built up and maintained a business wherein the sales of coal amount annually to nearly three million tons. (See page 18, Record.)

IX. That the public and dealers in coal uniformly acquiesced in the right of Castner & Co., Limited, and of these petitioners

to the use of said trade mark "Pocahontas" up to the time when the defendant began the acts complained of in the bill of complaint, that is to say, up to about the first day of November, 1896. (See pages 16, 17, Record.)

X. That the acts of the defendant complained of and proven by the record are as follows:—

(*a.*) The selling and advertising for sale, at reduced prices, of inferior coal by defendant as "Pocahontas" coal. (Record, page 59; pages 52, 53.)

(*b.*) The assumption by the defendant, Coffman, of the name of Pocahontas Coke and Coal Company, a company which exists only in the mind of the defendant, and was assumed solely for the purpose of deceiving the public. (Record, page 17.)

(*c.*) The selling of coal by defendant as Pocahontas coal, which coal had not been inspected, selected, and graded prior to its delivery to the customer. (See Record, pages 49–51, inclusive.)

(*d.*) The actual deception of certain persons of the trade who purchased coal from the defendant under the supposition that it was petitioners' Pocahontas coal, said customers having bought the coal on the strength of the assertion of defendant that it was the same as petitioners' Pocahontas coal. (See Record, pages 52, 53.)

XI. That these petitioners brought their bill in equity against the said defendant, Coffman, in the United States Circuit Court for the District of West Virginia, and upon the bill, affidavits, and exhibits found in the record, applied for a preliminary injunction, which was granted on the fifth day of May, 1897, and is found at pages 191–193, inclusive, of the record.

XII. That thereafter the defendant appealed to the Circuit Court of Appeals for the Fourth Circuit, whereupon, on May 3d, 1898, the said Circuit Court of Appeals rendered an opinion reversing the decree of the lower court granting the preliminary injunction, and remanded the cause to the court below,

with instructions to dismiss the bill (Record, pages 193–206, inclusive); that the decree of said Court of Appeals was duly entered (page 207, Record), and its mandate was issued and transmitted to the Circuit Court for the District of West Virginia. (Pages 210, 211, Record.)

XIII. That during the interim between the granting of the preliminary injunction and the rendering of the opinion of the Circuit Court of Appeals the petitioners filed their bill in equity against a consignee, and therefore a privy of the said Coffman, to-wit, W. C. Atwater & Co., of Fall River, Mass., in the Circuit Court for the District of Massachusetts, alleging the same facts as were alleged in the present case, and in addition thereto the fact of the privity existing between the said W. C. Atwater & Co. and the said defendant, Coffman; that the petitioners applied for and secured a preliminary injunction against the said W. C. Atwater & Co. upon the bill, affidavits, the record in the present case, and exhibits.

XIV. That in the case in Massachusetts the defendant appealed to the Circuit Court of Appeals for the First Circuit, and prior to the decision of said Circuit Court of Appeals for the First Circuit the Circuit Court of Appeals for the Fourth Circuit in the present case rendered its opinion, which opinion was thereafter suitably brought to the judicial knowledge of the Circuit Court of Appeals for the First Circuit in the W. C. Atwater & Co. case; that thereafter, on June 3d, 1898, said Circuit Court of Appeals for the First Circuit rendered its opinion, affirming the decree of the lower court granting the preliminary injunction against said W. C. Atwater & Co., and holding that these petitioners had a right to the name "Pocahontas" as a trade mark, and disagreeing with the Circuit Court of Appeals for the Fourth Circuit upon substantially the same state of facts; that a copy of the opinion of the Circuit Court of Appeals for the First Circuit is annexed to this petition.

XV. That by reason of the divergent views of different Circuit Courts of Appeals with regard to the rights of peti-

tioners to said trade mark "Pocahontas," your petitioners are uncertain as to whether or not they are entitled to the protection of said trade mark, and their business under said trade mark, which is of great magnitude and concern, is greatly disturbed; that the public at large are likewise confused and uncertain as to your petitioners' rights, all of which uncertainty and confusion can only be remedied by the judgment or decree of this Honorable Court upon a full presentation of the facts on the part of both appellees and appellants.

XVI. And your petitioners further represent that after the opinion of the Circuit Court of Appeals for the Fourth Circuit, and before the opinion of the Court of Appeals for the First Circuit had been rendered, your petitioners presented to the Circuit Court of Appeals for said Fourth Circuit, in the present case, a petition for rehearing, looking to the modification of the decree of the said Court of Appeals, so that this case should be remanded to the Circuit Court for the District of West Virginia with instructions to permit the parties to take their proofs in order that the cause might thereafter be heard upon pleadings and proofs to the end that a final decree might be entered; that upon said petition the court, on May 19th, 1898, rendered an opinion denying the petition; that said petition and opinion may be found at pages 207–210, inclusive, of the record.

XVII. And your petitioners further represent that the denial of this petition for rehearing and the entry of a final decree upon affidavits amounts to a gross injustice to your petitioners, inasmuch as they are precluded from offering further proofs in support of their bill of complaint, and are also precluded from exercising their rights upon cross examination of breaking down the alleged defenses advanced by the defendant's *ex parte* affidavits or rebutting said defenses; and inasmuch as it is apparent in the present case that a mixed question of law and fact exists upon which two Circuit Courts of Appeals hold diametrically opposite opinions, a denial of the petition for rehearing was clearly erroneous according to

the well-settled principles of this Honorable Court and of other courts of equity.

XVIII. And your petitioners further represent that inasmuch as the opinion of the Circuit Court of Appeals for the First Circuit was rendered upon an appeal from an interlocutory decree or order, the case in the First Circuit could not ordinarily be brought up by writ of *certiorari* for review by this court unless under circumstances such as are set forth in the present petition, For the convenience of this court and for its more certain knowledge of the facts in said case, this Honorable Court should of its own motion direct the bringing up for review of said case in the First Circuit, and hence your petitioners ask this Honorable Court to direct that the record in the Circuit Court of Appeals for the First Circuit be brought up for review.

Wherefore petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding the said court to certify and send to this Honorable Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled "W. H. Coffman, doing business under the name and style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Appellant, *vs.* Samuel Castner, Jr., and Henry B. Curran, trading under the firm name and style of Castner & Curran, Appellees, No. 231," to the end that the case may be reviewed and determined by this Honorable Court, as provided in section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3d, 1891; and that your petitioners may have such other or further relief in the premises as to this court may seem appropriate and in conformity with said Act, and that the said judgment of the said Circuit Court of Appeals

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for the Fourth Circuit in the said cause and every part thereof may be reversed by this Honorable Court.

And your petitioners will ever pray, &c.

SAMUEL CASTNER, JR., and
HENRY B. CURRAN,
Petitioners,

By their attorneys and counsel,

HENRY E. EVERDING,
ARTHUR v. BRIESEN.

Due service of the foregoing petition is hereby admitted, this day of , A. D. 1898.

Defendant.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

William C. Atwater & Co. et al., *Defendants, Appellants,*

vs.

Samuel Castner, Jr., et al., *Complainants, Appellees.*

October Term, 1897.
No. 239.

Appeal from the Circuit Court for the District of Massachusetts.

BEFORE PUTNAM, WEBB, AND BROWN, JJ.

OPINION OF THE COURT.

JUNE 1st, 1898.

PUTNAM, J.:

This is an appeal from an order granting a temporary injunction, and relates to an alleged trade mark or trade name "Pocahontas" used in the coal traffic. This has been used for fully twenty years by the complainants below and their predecessors in title in a very extensive trade, with unbroken public acquiescence until the controversy out of which this litigation arose in this circuit and in the Fourth Circuit. It does not indicate merely that the complainants below are the producers of the coal sold, but quite as much that it is sorted and put on the market under their implied representation of uniform quality and excellence. In addition to the public acquiescence of which we have spoken, there had been, prior to the injunction order appealed from, an adjudication in the Circuit Court in the Fourth Circuit, sustaining the claimed trade mark or trade name and enjoining its infringement.

It is said that the complainants' coal, and also the alleged infringing coal, come from an extensive locality now generally known under the name of Pocahontas, and it is claimed that the case therefore falls within the rule of Canal Company *vs.* Clark, 13 Wall., 311, and Columbia Mills Company *vs.* Alcorn,

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150 U. S., 460. But even if this were true in a general sense, it would remain to be considered whether the Supreme Court, in Singer Manufacturing Company *vs.* June Manufacturing Company, 163 U. S., 169, 203, 204, was not compelled to a qualification of the broad principle, claimed to have been stated in the cases referred to, as applied to trade marks and trade names which have been long and extensively used, and have become widely recognized by the public at large, even when they might not have originated in accordance with the ordinary rules of law. In that case the court found that some qualification of the rule that a word which indicates quality cannot be protected as a trade mark or trade name is necessary, at least in some classes of cases; and there is ground for maintaining that this applies with the same necessity to trade marks and trade names which represent well-known localities as to those of the character of that in question in that case. We do not, however, find it necessary to decide at present whether or not any qualification of that nature would be applicable to the case at bar, because so sharp a question does not now arise. Some of the reasons which render it necessary, under some circumstances, to protect, at least to a qualified extent, a trade mark of a geographical origin, were given by us in Levy *vs.* Waitt, 61 Fed. Rep., 1008, 1012.

The exact rule of Columbia Mills Company *vs.* Alcorn is implied in the following statement, at page 464:—

"The word 'Columbia' is not the subject of exclusive appropriation, under the general rule that a word or words in common use as designating locality or section of a country cannot be appropriated by any one as his exclusive trade mark."

This is explained in the same opinion, at page 465, by citing from Canal Company *vs.* Clark, *ubi supra*, the following expression:—

"The word 'Lackawanna' was not devised by the complainants. They found it a settled and known appellative of a district in which their coal deposits and those of others were situated. At the time they began to use it, it was a recognized description of the region, and, of course, of the earth and minerals in the region."

It is necessary to recognize carefully the distinction which these expressions imply. Otherwise, a manufacturer, producer, or dealer who furnishes goods of such excellent quality that they build up so extensive a trade as to give a distinctive name to the locality where it is pursued, would be defeated of the just fruits of his industry and integrity by the very fact of his own meritorious conduct. Therefore, even under the rule as stated in the Columbia Mills Company *vs.* Alcorn, *ubi supra*, and without the qualification recognized in Singer Manufacturing Company *vs.* June Manufacturing Company, *ubi supra*, the case at bar as presented to the court below and also to this court, involves a difficult question of fact, to the effect whether at the time the trade mark or trade name in question was adopted the word Pocahontas was in common use as designating a known locality, or whether the locality gained its name from the complainants. Therefore, the Circuit Court was not met with a pure question of law, but with a mixed question of law and fact; and, by the well-settled principles touching the granting of temporary injunctions, the court was fully justified in its action by the long and unbroken public acquiescence, without reference to the adjudication in the Fourth Circuit to which we have referred.

The defendants below suggest that the acquiescence was not unbroken, as stated by us, because the affidavits show that there was one dealer, Browning, who shipped his coal as Pocahontas coal, but they also show that all such coal was plainly tagged as follows: "Pocahontas coal, from the Browning mines." This, so far from interrupting the public acquiescence to which we have referred, supported it by an evident attempt on the part of Browning to bring himself within the rule stated in Singer Machine Company *vs.* June Manufacturing Company.

Since the granting of the injunction in the case before us by the court below, and since the appeal to this court and the arguments at bar on the appeal, the Circuit Court of Appeals for the Fourth Circuit, in Coffman *vs.* Castner, by an opinion passed down May 3d, 1898, has held that the claimed trade mark or trade name Pocahontas cannot be sustained, and has reversed the adjudication of the Circuit Court to which we

have referred, and has remanded the cause to that court with instructions to dismiss the suit. As the complainants in this case were the complainants in the case in the Fourth Circuit, it may be that if this had occurred before the action of the court below, now appealed from, no temporary injunction would have been granted. But, as the injunction was granted before the decision of the Circuit Court of Appeals was announced, the position is radically different. The order was clearly proper when made; and, if the circumstances remained unchanged, we could not reverse it. If the decision in the Fourth Circuit were in all respects final, we should hesitate to allow the injunction to continue, especially as the parties complainant are the same in each case. It is, however, not final, as it may be reversed, possibly, on a writ of *certiorari* from the Supreme Court. It would not be seemly for the courts in one circuit to grant, dissolve, and perhaps renew temporary injunctions according to varying conditions of litigation in other circuits; so that, as this injunction was clearly proper when granted, our only suitable course is not to interfere with it for any reason now apparent to us.

We, of course, do not mean to limit the usual powers of the court below over the injunction, as, while we accept the usual form of order, we attach to it the qualifications stated by us in Davis Electrical Works *vs.* Edison Electric Light Company, 60 Fed. Rep., 276, 282.

Some incidental matters were brought to our attention by the parties, but we believe all of them are rendered unimportant in view of the conclusions which we have stated. As neither party takes from our decision anything substantial, and as the circumstances are without precedent, we are not satisfied that equity requires that the appellants should pay the costs of this appeal.

The order appealed from is affirmed, neither party to recover costs of appeal.

NOTE BY THE COURT.—Pillsbury Washburn Flour Mills Co. *vs.* Eagle, 86 Fed. Rep., 608, which came to hand since our opinion was passed down, fully sustains our suggestions about trade names of geographical origin.

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HENRY & GRAHAM,
Lawyers,
Tazewell, Virginia.

July 29, 1898.

J. Walter Douglass, Esq., 914 Walnut St., Philadelphia.

DEAR SIR:—I am in receipt of yours of 27th instant, containing certain papers mentioned therein, relating to the application for the *certiorari* in the case of Castner and others against Coffman. I return them to you to-day, by express. My connection, and the connection of the firm of Henry & Graham, as counsel for Mr. Coffman, ceased when that case was decided by the Circuit Court of Appeals of the United States, except so far, of course, as relates to the collection of the costs growing out of that suit as part of it, which we are still authorized to collect, as we heretofore notified you. I mean by this, that we are retained no farther by Mr. Coffman than our immediate connection with the suit when it ended there. You will readily see, therefore, that we are not authorized to enter any appearance or sign any papers for Mr. Coffman, and hence decline to do so and return them to you.

Yours truly,

S. C. GRAHAM.

IN THE SUPREME COURT OF THE UNITED STATES.

Samuel Castner, Jr., and Henry B. Curran, Petitioners, vs. *W. H. Coffman, doing business under the name and style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company.*	October Term, 1898. No. . *In re* Petition for Writ of *Certiorari.*

AFFIDAVIT OF SERVICE OF NOTICE OF MOTION, MOTION, AND PETITION.

STATE OF WEST VIRGINIA, COUNTY OF MERCER, } *ss.*

George A. Shirey, being duly sworn according to law, deposes and says that he is of mature age, and that on the third day of August, 1898, he served the foregoing notice of motion, motion and petition upon W. H. Coffman, to him known to be the W. H. Coffman named in the above-entitled matter, by exhibiting the originals to said Coffman at his office in Bluefield, W. Va., and by leaving at the same time a copy of said originals with him.

GEORGE A. SHIREY.

Sworn to and subscribed before me, this third day of August, A. D 1898.

C. L. KING,
Notary Public.

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SUPREME COURT OF THE UNITED STATES.

Samuel Castner, Jr., and Henry B. Curran, trading under the firm name and style of Castner & Curran, Petitioners,

vs.

W. H. Coffman, doing business under the name and style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company.

October Term, 1899.

No. 113.

ON WRIT OF *Certiorari* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS.

HISTORY OF THE LITIGATION.

This cause was originally brought by the petitioners in the Circuit Court of the United States for the District of West Virginia. The bill of complaint (pages 2-6, Record) sets forth that the petitioners are the owners of a trade mark or name, "Pocahontas," for coal of a bituminous or semi-bituminous nature, and that the respondent, W. H. Coffman, under the fictitious name of Pocahontas Coke and Coal Company and other names, had infringed thereon. Accompanying the bill when filed were numerous affidavits

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and exhibits in support of the bill and in support of a motion for a preliminary injunction. Upon the argument of said motion before the Circuit Court, the respondent first interposed a demurrer to the bill (pages 72-74), which, after full argument, was overruled (page 75), and thereafter filed an answer accompanied by affidavits and exhibits in opposition to the motion for preliminary injunction. The petitioners thereupon filed certain affidavits in rebuttal, and upon the record thus formed, and after a lengthy argument for and against the motion, the Circuit Judge granted the motion. This order of the Circuit Court is found at pages 145, 146, Record, and from this order the respondent appealed to the United States Circuit Court of Appeals for the Fourth Circuit. The Circuit Court of Appeals thereafter reversed the order of the lower court and ordered that the bill of complaint be dismissed. The opinion of the Circuit Court of Appeals will be found at pages 147-158, Record, and its decree thereon at page 158, Record.

Before the mandate of the Circuit Court of Appeals on said decree had issued, the petitioners filed a petition for rehearing in order that the mandate to be issued by the court should direct that both parties proceed to final hearing upon pleadings and proofs. (Record, pages 158, 159.)

This petition was denied (page 160, Record), and thereafter the mandate directing the dismissal of the bill of complaint was issued. (Page 162, Record.)

To review the record and proceedings before the Circuit Court of Appeals, these petitioners filed in this court on the eighteenth day of August, 1898, a petition for writ of *certiorari*, which petition was granted and the writ issued on the twenty-fifth day of October, 1898. The writ of *certiorari* with the return was filed in this court on the twenty-second day of November, 1898.

As appears by said petition for writ of *certiorari*, the questions of law and of fact presented to the Circuit Court of Appeals for the Fourth Circuit were also presented to the Circuit Court of Appeals for the First Circuit, which latter court rendered its opinion after the two opinions of

the Fourth Circuit had been handed down, and with full knowledge of said opinions.

The opinions of the two Circuit Courts of Appeal are widely divergent: the Fourth Circuit holding that as a matter of law and of fact, the petitioners have no right to the trade mark or name "Pocahontas," whereas the First Circuit has held that as a matter of law and of fact these petitioners have a right to appropriate said name "Pocahontas" as their exclusive trade mark.

The opinion of the Circuit Court of Appeals for the First Circuit is reported in 88 Fed. Rep., 642, and its opinion on a petition for rehearing is reported in 90 Fed. Rep., 828. The main opinion will also be found at pages 12 to 15 of the motion papers filed in this court on the eighteenth day of August, 1898, upon the motion for writ of *certiorari*. For the convenience of the court, copies of both opinions of the First Circuit are appended to this brief.

STATEMENT OF THE CASE.

The record in the court below which forms the return to the writ of *certiorari* of this Honorable Court, discloses the following facts:—

I. That petitioners are residents and citizens of the State of Pennsylvania, and the defendant is a resident and citizen of the State of West Virginia.

II. That the amount in controversy in this cause, as appears by the bill of complaint (page 5 of Record), is in excess of the sum of $10,000.

III. That this suit was brought to restrain the said defendant, W. H. Coffman, from infringement of petitioners' trade mark "Pocahontas" as applied to coal.

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IV. That the petitioners derived title to this trade mark by an assignment under date of April 1st, 1895, from the South-West Virginia Improvement Company to your petitioners. (Pages 10 to 12, Record.)

V. That the undisputed facts relating to the adoption and use of "Pocahontas" as a trade mark for coal by the South-West Virginia Improvement Company, may be briefly stated as follows:—

In the year 1881 the tract of land in which the coal is now mined was an unexplored wilderness (see Record, pages 134, 135); that the only name given to the region at that time and for years afterward was the Great Flat Top Region (page 135, Record); that during the years 1881 and 1882 the South-West Virginia Improvement Company developed this wilderness, opened coal mines, built many houses for the reception of its employees, and in other ways converted the wilderness into a hive of industry (page 135, Record); that during the year 1882 the said South-West Virginia Improvement Company adopted the name or symbol "Pocahontas" as a trade mark for its output of coal (page 13, Record); that the town near which the mines of the South-West Virginia Improvement Company were located was founded by the said company (page 13, Record); but said town was not incorporated and had no legal existence until January 31st, 1884, when by Act of the Legislature of Virginia it was so incorporated (see Act of Incorporation, pages 54-59, Record); that long after the coal of the South-West Virginia Improvement Company had become well established and known in the markets of the world as "Pocahontas" coal, the region from which it comes was colloquially named the Pocahontas Coal Field; that prior to the opening of the mines of the South-West Virginia Improvement Company, coal was not known to exist in any quantity in this region, and being a wilderness, remote from railways, and without even carriage or wagon roads, and practically without population, this section of the country had no

distinctive designation or geographical name. (See page 134, Record.)

VI. That the record shows that after the adoption and use of the trade mark "Pocahontas" by the said South-West Virginia Improvement Company, and prior to the year 1884, Castner & Co., Limited, the predecessors of petitioners, purchased, inspected, and purified the coal mined by said South-West Virginia Improvement Company and shipped and sold said inspected and selected coal, principally at tidewater points, under the name of "Pocahontas" coal; that thereafter, about the year 1889, the petitioners succeeded to the business of said Castner & Co., Limited, and became the sole agents and licensees of the said South-West Virginia Improvement Company in the sale of coal mined by said company, which coal was uniformly inspected, selected, and sold for twelve years by the petitioners and their predecessors, with the license and permission of the said South-West Virginia Improvement Company, as "Pocahontas" coal; and that since the assignment of the said trade mark in 1895 the petitioners, as owners of said trade mark, have continuously inspected, selected, and sold coal under the said trade mark or name of "Pocahontas." (See Bill of Complaint, sections III., IV., V., VI., pages 2 and 3, Record; also pages 12, 13, Record.)

VII. That the inspection, selection, and grading of their coal prior to its sale under the name of "Pocahontas" was and is necessary to preserve to the coal a uniform and standard quality, and involves the expenditure yearly of many thousands of dollars and the employment of from one to two hundred men (page 32, Record); and that in this inspection, selection, and grading the men employed are under the control of petitioners, and are compelled by petitioners to observe many rules and regulations, as appears by said rules and regulations, which are printed *in extenso* at pages 32-34, inclusive, of the record.

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VIII. That by reason of their care in the selection, inspection, and grading of their coal, and an enormous outlay of money in the advertising for sale and in the selling of their coal as "Pocahontas" coal, these petitioners have built up and maintained a business wherein the sales of coal amount annually to nearly three million tons. (See page 15, Record.)

IX. That the public and dealers in coal uniformly acquiesced in the right of Castner & Co., Limited, and of these petitioners to the use of said trade mark "Pocahontas" up to the time when the defendant, Coffman, began the acts complained of in the bill of complaint, that is to say, up to about the first day of November, 1896. (See pages 14, 15, Record.)

X. That the acts of the defendant complained of and proven by the record was as follows:—

(*a.*) The selling and advertising for sale, at reduced prices, of inferior coal by defendant as "Pocahontas" coal. (Record, pages 40, 41, 46.)

(*b.*) The assumption by the defendant, Coffman, of the name of Pocahontas Coke and Coal Company, a company which exists only in the mind of the defendant, and was assumed solely for the purpose of deceiving the public. (Record, page 15; defendant's answer, section XIII., pages 85, 86, Record.)

(*c.*) The selling of coal by defendant as Pocahontas coal, which coal had not been inspected, selected, and graded prior to its delivery to the customer. (See Record, pages 38, 39.)

(*d.*) The actual deception of certain persons of the trade who purchased coal from the defendant under the supposition that it was petitioners' Pocahontas coal, said customers having bought the coal on the strength of the assertion of defendant that it was the same as petitioners' Pocahontas coal. (See Record, pages 40, 41; see also letter of defendant's agents, Rowe & Woodruff, page 123, Record.)

HISTORY OF COMPLAINANT'S TRADE MARK.

In the year 1881, that part of the county of Tazewell, in which the first mine of the South-West Virginia Improvement Company was located, was a wilderness "remote from railways and without even carriage or wagon roads, and practically without population," and without distinctive designation (page 134, Record), the only name given to the region at that time and for years afterwards being "Flat Top" or "Great Flat Top Region" (page 135, also Exhibit A, page 16; also defendants' proof, pages 87, 88, 104, &c.) In the year 1881 this wilderness was explored by Frederick J. Kimball, then connected with the Norfolk and Western Railroad Company, and he discovered that coal of a bituminous or semi-bituminous nature could easily be mined therein. (Page 53.) He interested capitalists who acquired the charter of the South-West Virginia Improvement Company, a corporation which had been organized by the legislature of Virginia in 1880. (Page 7, Record.) Early in the year 1882 this company began operations. It opened and developed coal mines and marketed the product, and the coal produced was called "Pocahontas" coal. (Kimball, pages 53 and 54, Record.) This is corroborated by Welch. (Record, page 135.) The word "Pocahontas" was never used or suggested in connection with this region until after it had been adopted by the South-West Virginia Improvement Company in 1882, as a name for its coal. (Pages 12 and 13, also page 134.)

It appears that the coal was not marketed in very considerable quantities until the branch of the Norfolk and Western Railroad to the coal fields was completed, which was early in the year 1883. (Page 54, page 100.) The complainants have adduced some records showing the use of the name Pocahontas as a particular designation of the coal sold by the South-West Virginia Improvement Company at the seaport of Norfolk, Va., in the year 1883. This evidence consists of sundry letters, bills, &c. The earliest in date is a letter from an agent of the Improvement Com-

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pany, dated July 5th, 1883, wherein it is stated that a certain testimonial confirms the views of the writer, which he has held all along, that "the Pocahontas coal is the best steam coal in the market." (Pages 60, 61, Record.)

Next is a receipt for $812.35 for twelve cars "Pocahontas" coal (over two hundred tons). This is dated July 30th, 1883. (Page 61, Record.) Several invoices are produced (page 62, Record) showing sales of about five hundred tons of coal by the South-West Virginia Improvement Company, to different parties, wherein all of the coal is particularly designated as "Pocahontas" coal.

The defendant shows by its exhibit (page 103, Record) that over sixty thousand tons were sold by the South-West Virginia Improvement Company in 1883. It likewise shows by the same exhibit (page 100, Record) that in 1882 the shipment from the mines, when first opened, was from two to three hundred tons per day. All this was "Pocahontas" coal.

The name "Pocahontas" became geographical in the sense of designating a distinctive part of the State of Virginia in January, 1884, when the town of Pocahontas, located in Tazewell County, was incorporated by the legislature of Virginia. (Page 55, Record.) Thereafter, as abundantly appears from the record, the coal was mined in ever-increasing quantity, until at the time of bringing this suit, the annual production amounted to nearly three million tons of "Pocahontas" coal. (Page 15.) Even after its incorporation in 1884, there were "thousands of people in the State who did not know there was such a place as 'Pocahontas.'" A big explosion at the mines, a terrible disaster, first attracted the attention of outsiders to the *place*. (Defendant's Exhibit, page 100, Record.)

Other mines were opened in addition to the original mines of the South-West Virginia Improvement Company, which were given various names. (Pages 105-109, Record.) Coal from all these mines was handled and sold by Castner & Curran, the present complainants, and by

their predecessors, Castner & Co., Limited, and all that which was of a suitable quality of excellence was marketed as "Pocahontas" coal from 1882 to the time of bringing suit. (Pages 32-34.) This is established by the agreements of December 29th, 1884 (pages 16-25, Record), between the Norfolk and Western Railroad Company, the South-West Virginia Improvement Company, the Flat Top Coal Company, and a number of other coal operators and Castner & Co., Limited, whereby the latter firm was appointed tidewater agents for the sale of all of the coal of said mines, and in turn agreed not to sell any other bituminous or semi-bituminous coal than that covered by said agreements; also by the affidavit of Mr. Castner (page 12, Record), where he says (page 13) that the firm of Castner & Co., Limited, had, previous to the making of said agreements, received coal from the South-West Virginia Improvement Company, which it had sold as "Pocahontas" coal; also that after the making of said agreement Castner & Co., Limited, up to 1889, and thereafter their successors, Castner & Curran, continued the sale of said coal under said agreements by the license and permission of the South-West Virginia Improvement Company, up to March 26th, 1895.

On March 26th, 1895, Castner & Curran became *general agents* for the sale of all coal mined in the "Great Flat Top Region." (Page 13, Record.)

On April 1st, 1895, by an assignment dated on that day, Castner & Curran acquired the title of the South-West Virginia Improvement Company to the trade mark "Pocahontas." (Page 10, Record.)

In this assignment the significant statement is made that the trade mark "Pocahontas" was *adopted* by the South-West Virginia Improvement Company about July 1st, 1882. (Page 10.)

Mr. Castner states in his affidavit that from 1883 up to the time of bringing suit the complainants and their predecessors have continuously acted as factors and agents for the sale of coal from the Great Flat Top district under the distinctive title of "Pocahontas" or "Pocahontas Flat

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Top." (Page 13.) He also states that the complainants and their predecessors have expended large amounts of money in the

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of said coal, and in maintaining its superior quality and in advertising the same as "Pocahontas." (Page 13.)

In Mr. Curran's affidavit it is stated that the output from the various mines varies greatly in quality and purity. (Page 32.) That when Castner & Co., Limited, began to handle coal from the said region it established a system of inspection and selection of the coal prior to its shipment from each mine, and that this system was continued up to the time of bringing suit. Castner & Curran place at the "tipple" of each mine a sub-inspector and several assistants, and they have a superintendent and two chief inspectors and assistants.

During 1896 the complainants, to insure the high standard of the Pocahontas coal, employed from one to two hundred men in inspecting coal, and many thousands of dollars in salaries were spent for that purpose.

This was necessary to bring the products of the various mines to a uniform standard of excellence, and the continued practice of the complainants in this regard has resulted in the enormous increase in the demand for the "Pocahontas" coal. (Page 32, Record.)

Mr. Curran also produces as a part of his affidavit the rules laid down by the complainants for the guidance of the inspectors, which are printed at pages 32, 33, and 34, and from which it will be apparent that this inspection is deemed of paramount importance by complainants.

The *Iron Belt* for October, 1891 (page 98), exhibited by the defendant, has the following in relation to the care displayed in grading and selecting the Pocahontas coal:—

> *"In getting out coal for shipment every ton is required to come up to a certain standard, which it is needless to say is high, otherwise it is condemned. That 'Pocahontas' coal is of superior quality has been demonstrated by careful analysis."*

ARGUMENT.

In this cause the Circuit Court of Appeals for the Fourth Circuit, as appears by its two opinions, considered that but one vital proposition of law should be considered. This proposition can perhaps be better stated in the form of a question, which has been decided by the Circuit Court of Appeals for the Fourth Circuit in the negative.

This question, which is broad enough, perhaps, to cover all other questions involved in this case, is as follows:—

CAN A GEOGRAPHICAL NAME UNDER ANY CIRCUMSTANCES BECOME THE SUBJECT MATTER OF A TRADE MARK?

In answering this question the Fourth Circuit in its opinion upon the petition for rehearing (Record, page 160), held that—

> *"the word 'Pocahontas' could not be exclusively appropriated by the complainants as a 'trade mark' or 'word symbol,' for the reason that it was and is a geographical word. * * * We are clearly of the opinion, not only that the complainants below are not entitled to an injunction, but also that there is no equity in their bill."*

Referring to the opinion upon the appeal, it will be found that the proposition of law advanced by the Fourth Circuit, to the effect that under no circumstances can a geographical name be appropriated as a trade mark or name, apparently is predicated primarily upon the decisions of the Honorable Supreme Court of the United States. These decisions are Canal Company *vs.* Clark, 13 Wall., 311; and Columbia Mill Co. *vs.* Alcorn, 150 U. S., 460.

According to petitioners' contention both in the Fourth and First Circuits, these two cases can readily be distinguished from the case at bar.

Thus the petitioners contended that in the first of these cases it was held that the words "Lackawanna Coal" could not constitute a valid trade mark, the word "Lackawanna" *having been in common use to designate the locality from which both complainants' and defendant's coal*

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was obtained long prior to the mining of coal by complainants.

In the second of these cases it was held that the word "Columbia" *was one primarily of geographical significance,* and could not be appropriated as a trade mark by the complainant. It was also held in this case that the complainant was not the first to use the word "Columbia" to designate flour.

In the case at bar the bill alleges and the record shows that "Pocahontas" was not in common use to designate the locality from which both complainants' and defendant's coal was obtained long or at any time prior to the mining of coal by complainants' predecessors. On the contrary, the proof is undisputed that the South-West Virginia Improvement Company gave the name "Pocahontas" to its coal, to its mines, to its mining village, and to its post office, and long before the name "Pocahontas" came into general or any use to designate the locality in which the coal was found.

Thus Welch, a pioneer in the field, testifies (Record, page 135) that in 1881 the tract of land in which the mines are situated *was a wilderness;* that in 1881 and 1882 the South-West Virginia Improvement Company opened its mines, built many houses for the reception of its employees, and in other ways converted the wilderness into a hive of industry; that the coal region in which the town of Pocahontas was and is situated has uniformly been known as the Great Flat Top region and that no coal district, region, or field in either Virginia or West Virginia was known geographically or geologically as "Pocahontas" prior to the mining of coal by said South-West Virginia Improvement Company.

But irrespective of the particular facts in the case at bar (which facts will be discussed in a subsequent portion of this brief), the interpretation which the Circuit Court of Appeals for the Fourth Circuit has given to the decisions in the "Lackawanna" and "Columbia" cases is directly at variance with the interpretation of these cases given by various courts throughout the United States.

The Lackawanna case was considered by the Court of Appeals of Kentucky in Metcalfe *vs.* Brand, 5 So. W. Reporter, 773-778, and it was held therein that—

> *"The right of one person to appropriate the name of a region of country to the exclusion of others who produce or sell a similar product of the same region, may be regarded as settled by the Supreme Court in Canal Co.* vs. *Clark, 13 Wall., 311, commonly known as the Lackawanna coal case. Lackawanna is the name of a considerable region of country. Lackawanna coal is a natural product of that region, and the name was descriptive of the general character or quality of the product. * * * Being generic and thus descriptive, it was held that each of the contestants had a right to call his coal 'Lackawanna Coal,' but this case cannot be regarded as holding that the name of a place can under no circumstances become a trade mark."*

In Pillsbury Washburn Flour Mills Co. *vs.* Eagle, 86 Fed. Rep., 608, it was held by the Circuit Court of Appeals for the Seventh Circuit, that the true rule laid down by this court in the "Lackawanna" and "Columbia" cases was that

> *"irrespective of any question of trade marks, rival manufacturers have no right by imitative devices to beguile the public into buying their wares under the impression that they are buying those of their rivals."*

In the Pillsbury case it was further held (page 617):—

> *"So in the case at bar, the complainants can have no exclusive right to the use of the geographical names 'of 'Minneapolis' or 'Minnesota.' They are not the subject of a trade mark proper. Any one or more of the two hundred thousand inhabitants of Minneapolis may use that word upon their flour. The defendant or any other person from any State may go there, and establish a mill, and brand his flour 'Minnesota Patent' and 'Minneapolis, Minnesota.'*

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The defendant might have continued to buy Minneapolis flour and branded it 'Minneapolis, Minn.,' and had all the benefit which these marks would give him in the market, because he would be adhering to the truth and fair dealing. But when he places these same brands upon another flour manufactured in Wisconsin, he departed from the truth and placed a lying brand upon his goods, which was intended to deceive, and could not but deceive, the public, and result in injury to the complainant's business. If the defendant could do this, all other persons could do the same thing, and so the public would be defrauded, and the goodwill and business of complainants, which has taken thirty-nine years to build up, would be greatly impaired, if not destroyed. If this could be permitte', there would not be much incitement to provide the public with a high grade of flour, such as the complainants have been manufacturing for many years, and which the evidence shows had led the markets of the world, if, by all manufacturers using the same brand, the complainants' flour may be confounded with all lesser grades and kinds made from all sorts and grades of wheat."

Also at page 627, the court said:—

"The cases in which a person has been enjoined from using his own name in connection with other labels or brands upon his goods proceed upon the same general ground of deceit and unfair competition in trade. If a person may be restrained from the use of his own name upon his own goods, because such use in the circumstances will deceive the public into puchasing his goods, believing them to be the goods of another, to the injury of the public and the goodwill and business of such other person, so, also, on the like principle may he be restrained from using any other proper or geographical name when such use will produce like results."

In Illinois Watch Case Co. *vs.* Elgin Nat. Watch Co., 94 Fed. Rep., 667, the Circuit Court of Appeals for the Seventh Circuit again affirms the doctrine in the Pillsbury case.

In the *Waltham Watch Case* (Am. Waltham Watch Co. *vs.* The U. S. Watch Co., 53 N. E. Rept., 141), the Supreme Court of Massachusetts applied the same doctrine as was announced in the Elgin case cited above.

The case of Glendon Iron Co. *vs.* Uhler, 75 Pa., 467, 15 Am. Rep., 599, was relied upon by the defendant before the Circuit Court of Appeals, and was quoted from by the Fourth Circuit in support of its opinion. We call the attention of the court to the fact that a report in full of this Glendon case is only found in the 75 Penna. Reports, and that in 15 Am. Rep. the report is misleading, because important facts are therein omitted. If that case is cited as sustaining the proposition that every person living or carrying on business at a certain place has a right to use the name of the place to indicate the origin of the goods, then this case is in direct conflict with the later decisions in the "Elgin," "Waltham," and "Minneapolis Flour" cases. But we do not so read the "Glendon" case.

In Gebbie *vs.* Stitt, 82 Hun., 93 (1894), plaintiffs, previous to 1891, had long manufactured plows at Deer River, N. Y., and their plows became generally known as "Deer River Plows." They were stamped on the top of the beam, "Deer River." Plaintiffs moved to Lowville, N. Y., in 1891, but continued to manufacture plows stamped "Deer River" as before. Defendant, in 1893, bought original plow works at Deer River and manufactured the same kind of plow as the plaintiffs, and stamped them "Deer River" on the top of the beam, and on the side of the beam "L. E. Stitt, M'F'R. Deer River, N. Y." On application for preliminary injunction, it was said by Merwin, J. (page 98), that the defendant—

> *"was in the attitude of committing * * * upon the plaintiffs a fraud by inducing persons to deal with him under the belief that they were dealing with the*

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person, or true representatives of the person, who had given a reputation to the name."

Defendant, accordingly, enjoined from—

*"manufacturing, selling, or in any way or manner disposing of * * * plows bearing, in any manner or form whatever, the name 'Deer River' as a name or trade mark, or any name like or similar thereto, which might deceive or tend to deceive the public to plaintiffs' harm."*

In Montgomery *vs.* Thompson (1891), App. Cas., 217, these facts appeared:—

Stone is a town of about six thousand inhabitants. Plaintiffs and their predecessors had operated continuously the only brewery in the place since 1780. Defendant shortly before the suit erected a brewery in Stone, and marked his ale "Stone Ale" and "Stone Ales." It was not disputed that under these appellations plaintiffs' ale had won and enjoyed a considerable reputation. "A trader," said Lord Watson (v., page 217), "who buys ale under one or the other of these designations relies upon its having been manufactured by the plaintiffs; and even those consumers who do not know the manufacturer or the place of manufacture, expect to get the same ale which they have been in use to purchase, namely, the plaintiffs'." Defendant was unconditionally enjoined in the Court of Appeals from selling his ale under the term "Stone Ale" or "Stone Ales." He appealed, and contended that he had a right to use those words so long as he used them in combination with other words which sufficiently distinguished his manufacture from that of plaintiffs'.

It was said by Lord Herschell, L. C. (page 220):—

"I do not think the principles on which the court ought to act in such a case as the present is open to doubt. The respondents are entitled to ask that a rival manufacturer shall be prevented from selling

*his ale under such a designation as to deceive the public into the belief that they are obtaining the ale of the respondents, and he ought not the less to be restrained from doing so, because the practical effect of such restraint may be much the same as if the persons seeking the injunction had a right of property in a particular name. * * * The injunction might, no doubt, have been framed in more general terms; * * * but had it been so, the same question as has been discussed at the bar would have arisen on an application to commit the defendant for breach of injunction in respect of selling his ale as 'Stone Ale'; and the court having come to the conclusion that he could not sell the liquor manufactured by him under that name without inducing the belief in the mind of the purchaser that he was obtaining the plaintiffs' ale, a conclusion from which I see no ground for differing. I do not think it was improper to frame the injunction in the form accepted, and thus to determine the question at once instead of leaving it to be raised and contested on an application to commit."*

It was said by Lord Watson (page 221):—

*"The precise terms in which an injunction ought to run must depend upon the particular facts of the case. In the present case I feel somewhat hampered by the consideration that the only appeal is at the instance of the defendant, and the injunction cannot recast in any way to his disadvantage. Had the matter been open, I should have preferred an order restraining the defendant 'from using the word "Stone" as descriptive of or in connection with ale or beer manufactured by him, or ale or beer (not being of plaintiff's manufacture) sold or offered for sale by him without clearly distinguishing such ale or beer from the ale or beer of the plaintiffs'. * * * But it appears to me that an injunction in these or similar terms would involve a prohibition against selling ale or beer*

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other than the plaintiffs' under the terms 'Stone Ales' or 'Stone Ale,' and might, in other respects, be more stringent than the order as settled by the Lords Justices."

Lord Hannen said (page 227) that:—

"The appeal to this House is based on the contention that the word 'Stone,' in connection with ale or beer, is merely used by the appellant in a geographical sense, as indicating that the ale or beer is manufactured at that place, and that any one is entitled to use it in that sense, provided he does not use it so as to induce the belief that his goods are the goods of manufacturers previously established at Stone. The principle contended for by the appellant may be admitted as correct, but in considering what may induce purchasers to believe that the appellant's goods are the goods of the respondents, all the circumstances of the case must be taken into account. Here the evidence has satisfied Chitty, J., and the Court of Appeal, and, I think, ought to satisfy your Lordships, that the respondent's goods had acquired by long usage the name of 'Stone Ale' and 'Stone Ales'; that that name does not merely convey the idea that the beer was manufactured at Stone, but that it was ale of the respondent's manufacture. The appellant is undoubtedly entitled to brew ale at Stone, and to indicate that it was manufactured there, but there are various means of stating that fact without using the name which has now become the designation of the respondent's ale."

Lord Macnaghten said (page 224):—

"I do not see any way to alter it" (i. e., *the injunction*) *"at all, except in making it more stringent and more severe, and that would be hardly fair to the appellant on his appeal. I think that an order in the terms read by my noble and learned friend opposite"*

(Lord Watson)—"an injunction in the form of that granted in Seixo vs. *Provezende—would have better met the justice of the case. * * * It is obvious, I think, that if the injunction had been in that form, the appellant could not have used the term 'Stone Ales' at all. It would have been impossible for him to have called his ales 'Stone Ales' and to have distinguished his ales from those of the plaintiff. Any attempt to distinguish the two, even if honestly meant, would have been perfectly idle."*

The injunction appealed from and affirmed, restrained defendant, *inter alia*, from selling or causing to be sold any ale or beer not of plaintiffs' manufacture under the term "Stone Ale" or "Stone Ales," or in any way so as to induce the belief that such ale or beer is of the plaintiffs' manufacture.

In Atwater *et al. vs.* Castner *et al.*, 88 Fed. Rep., 642-43, the Circuit Court of Appeals for the First Circuit thus interprets the rule of this court with relation to geographical names as laid down in the "Lackawanna" and "Columbia" cases:—

"It is said that the complainants' coal, and also the alleged infringing coal, come from an extensive locality now generally known under the name of Pocahontas, and it is claimed that the case thereto falls within the rule of Canal Company vs. *Clark (13 Wall., 311, and the Columbia Mills Company* vs. *Alcorn, 150 U. S., 460. But even if this were true in a general sense, it would remain to be considered whether the Supreme Court, in Singer Manufacturing Company* vs. *June Manufacturing Company, 163 U. S., 169, 203, 204, was not compelled to a qualification of the broad principle claimed to have been stated in the cases referred to, as applied to trade marks and trade names which have been long and extensively used, and have become widely recognized by the public at large, even when they might not*

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have originated in accordance with the ordinary rules of law. In that case the court found that some qualification of the rule that a word which indicates quality cannot be protected as a trade mark or trade name is necessary, at least in some classes of cases, and there is ground for maintaining that this applies with the same necessity to trade marks and trade names which represent well-known localities as to those of the character of that in question in that case. We do not, however, find it necessary to decide at present whether or not any qualification of that nature would be applicable to the case at bar, because so sharp a question does not now arise. Some of the reasons which render it necessary, under some circumstances, to protect, at least to a qualified extent, a trade mark of a geographical origin, were given by us in Levy vs. Waitt, 61 Fed. Rep., 1008, 1012; S. C. 10 C. C. A., 227.

"The exact rule of Columbia Mills Company vs. Alcorn is implied in the following statement, at page 464 (150 U. S.):—

"'The word "Columbia" is not the subject of exclusive appropriation, under the general rule that a word or words in common use as designating locality or section of a country cannot be appropriated by any one as his exclusive trade mark.

"This is explained in the same opinion, at page 465, by citing from Canal Company vs. Clark, ubi supra., *the following expression:—*

"'The word "Lackawanna" was not devised by the complainants. They found it a settled and known appellative of a district in which their coal deposits and those of others were situated. At the time they began to use it, it was a recognized description of the region, and, of course, of the earth and minerals in the region.'

"It is necessary to recognize carefully the distinction which these expressions imply. Otherwise, a manu-

facturer, producer, or dealer who furnishes goods of such excellent quality that they build up so extensive a trade as to give a distinctive name to the locality where it is pursued, would be defeated of the just fruits of his industry and integrity by the very fact of his own meritorious conduct. Therefore, even under the rule as stated in the Columbia Mills Company vs. *Alcorn*, ubi supra, *and without the qualification recognized in Singer Manufacturing Company* vs. *June Manufacturing Company*, ubi supra, *the case at bar as presented to the court below and also to this court, involves a difficult question of fact, to the effect whether at the time the trade mark or trade name in question was adopted, the word Pocahontas was in common use as designating a known locality, or whether the locality gained its name from the complainants."*

In the case at bar, the bill of complaint was dismissed and no opportunity given to present the facts of the case on final hearing solely because the Circuit Court of Appeals for the Fourth Circuit found that "Pocahontas" was and is a geographical word, and that, therefore, "further proofs relating to the same would be unavailing."

This was defendant's main defense. (Record, page 29, letter of defendant to petitioners under date of November 12th, 1896.)

In the cases cited above, the Court of Appeals of Kentucky, the Circuit Court of Appeals for the Seventh and the First Circuits have held that whether or not a geographical name can be appropriated as a trade mark depends upon the particular circumstances of each case.

IN THE CASE AT BAR THE FACTS, WE BELIEVE, ARE SUCH AS TO CLEARLY DISTINGUISH THE PRESENT CASE FROM EITHER THE "LACKAWANNA" OR THE "COLUMBIA" CASES.

The bill of complaint in the present case alleges (Record, page 2):—

"I. That heretofore and about the year 1882, in the State of Virginia and county of Tazewell, in said

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State, a tract or field of smokeless bituminous or semi-bituminous coal was opened and mined.

"II. That during said year 1882, the first mine in said region or field was opened and operated in Tazewell County, Virginia, by the South-West Virginia Improvement Company, a corporation duly organized and transacting business under the laws of the State of Virginia, a copy of the charter of said corporation being hereto annexed and marked 'Exhibit A.' That shortly thereafter, but still in the year 1882, the said corporation, the South-West Virginia Improvement Company, named their mine Pocahontas, and began selling their coal therefrom as 'Pocahontas coal,' having adopted the trade mark 'Pocahontas' as designating its said output."

These allegations are not successfully denied. They are supported by the affidavits of Castner (Record, pages 12 and 13); Kimball (Record pages 53, 54, also page 134); and Welch (Record, page 135).

Kimball testifies (pages 53, 54, Record), as follows:—

"That he was president of the Norfolk and Western Railroad Company for thirteen years, beginning with the year 1883, and for several years prior thereto he was vice-president of said company; that during the year 1881 while he was connected with the said company he explored that portion of Tazewell County, Virginia, at which the coal mine of the South-West Virginia Improvement Company is now situated, and found that coal of a bituminous or semi-bituminous character could be easily mined in large quantities at that place; that this deponent was instrumental in securing capital for the development of the region thereabouts, and succeeded in interesting capitalists who acquired the charter of the South-West Virginia Improvement Company, a company which had been incorporated by Act of the Legislature of Virginia in March 1880, and the said company then began the erection of the necessary plant and the construc-

tion of the necessary machinery for the mining of coal in said Tazewell County, Virginia; that the mines of said South-West Virginia Improvement Company were opened and developed early in the year 1882 and before the middle of said year, but coal was not shipped in large quantities until the completion of the branch of the Norfolk and Western Railroad Company to the coal fields and mine openings designated the 'East' Mine and 'West' Mine, which was in the year 1883; that prior to the building of this branch railroad and opening of the said mines, this section of the country was a wilderness; that deponent remembers the history of these early transactions, because as an officer of said Norfolk and Western Railroad Company he was interested in developing traffic for his railroad from the said mines; that some time about the middle of the year 1882, the said South-West Virginia Improvement Company called their settlement and post office Pocahontas, and upon the completion of the branch of said road the station was called 'Pocahontas' and the coal mined and marketed under the name and style of 'Pocahontas' coal; and thereafter, to wit, in 1884, the town of Pocahontas was incorporated, as appears by a certified copy of its charter, marked 'Exhibit Pocahontas Charter,' hereto annexed. The said coal was sold as 'Pocahontas' coal in 1883, as appears by a copy of the 'Exhibit, Collins Receipt,' hereto annexed. The mining town of Pocahontas was created by the above efforts to mine said coal, and did not exist until the miners and others who took part in these efforts settled in said wilderness."

He further testifies (page 134, Record) that:—

"Prior to the opening of the mines of the South-West Virginia Improvement Company, coal was not known to exist in any quantity in this region and being a wilderness, remote from railways, and with-

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out even carriage or wagon roads, and practically without population, this section of country had no distinctive designation."

To the same effect is the affidavit of Welch. (Record, page 133.) In the *Iron Belt* of October, 1891, offered in evidence by defendants, the foregoing history of the development of this coal field is corroborated. (Record, pages 99 and 100.)

We have therefore at the outset a very different state of affairs in the present case from that in either the "Lackawanna" or "Columbia" cases.

As Mr. Justice Strong said, speaking for the court in the "Lackawanna" case:—

"Whether the name 'Lackawanna Coal' was devised or adopted by them as a trade mark before it came into common use is not so clearly established. On the contrary, the evidence shows that long before the complainants had commenced their operations, and long before they had any existence as a corporation, the region of country in which their mines were situated was called 'The Lackawanna Valley'; that it is a region of large dimensions, extending along the Lackawanna River to its junction with the Susquehanna, embracing within its limits great bodies of coal lands, upon a portion of which are the mines of the complainants, and upon other portions of which are the mines of the Pennsylvania Coal Company, those of the Delaware, Lackawanna and Western Railroad Company, and those of other smaller operators. The word 'Lackawanna,' then, was not devised by the complainants. They found it a settled and known appellative of the district in which their coal deposits and those of others were situated. At the time when they began to use it it was a recognized description of the region, and of course of the earths and minerals in the region."

This language undoubtedly distinguishes the "Lackawanna" case from the "Pocahontas" case, for when the

South-West Virginia Improvement Company began to mine their coal in Tazewell County they found "no settled and known appellative of the district in which their coal deposits and others were situated," which appellative was "Pocahontas." On the contrary, they CREATED that appellative "Pocahontas" to distinguish their mines and coal from the "settled and known appellative of the district," which was "Great Flat Top" or "Flat Top."

In the "Columbia" case, Mr. Justice Jackson, speaking for the court, said:—

> *"The word 'Columbia' is not the subject of exclusive appropriation under the general rule that the word or words in common use as designating locality or sections of a country cannot be appropriated by any one as his exclusive trade mark."*

Amplifying this doctrine the Justice further held:—

> *"The appellant was no more entitled to the exclusive use of the word 'Columbia' as a trade mark than he would have been to the use of the word 'America,' or 'United States,' or 'Minnesota,' or 'Minneapolis.' These merely geographical names cannot be appropriated and made the subject of exclusive property. They do not, in and of themselves, indicate anything in the nature of origin, manufacture, or ownership; and in the present case the word 'Columbia' gives no information on the subject of origin, production, or ownership."*

In the case now before the court the word "Pocahontas" was not in common use in 1882, when adopted by the complainants' assignor, to designate any locality or section of any country. When adopted it did clearly indicate origin and ownership. It was *the* Pocahontas coal and mine of the South-West Virginia Improvement Company.

The bill of complaint in the present case (Record, page 4) also contains the following allegations:—

> *"XI. And your orators further show unto your Honors that the defendant, W. H. Coffman, is a*

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factor or agent engaged in the sale of coal and coke at Bluefield, West Virginia, and elsewhere, and amongst other things he sells and advertises for sale are bituminous and semi-bituminous coals from the Indian Ridge Colliery, situated in West Virginia, which coals are inferior in quality and purity to the coal of your orators, said coal of the defendant not being of the standard established by your orators, but being greatly inferior thereto in respect to quality, purity, and also in respect to size.

"XII. Yet your orators aver and charge, that the said defendant, well knowing the premises, and intending and contriving to deceive dealers in coal and the public and to cause purchasers of coal sold by the said defendant to believe that the same was sold your orators, or is of the quality of that sold by your orators, has at Bluefield, West Virginia, in the District of West Virginia, and elsewhere, unlawfully offered for sale and sold a very inferior and a very impure coal under the name and designation of 'Pocahontas,' and has and is accompanying the offer as well as delivery of said inferior and impure coal with letters, notes, and bills, whereon the word symbol 'Pocahontas' is prominently displayed, and in which the words 'Pocahontas' coal or 'Pocahontas' Flat Top coal, or sundry abbreviations thereof, appear in a most conspicuous manner, and that purchasers or would-be purchasers of his inferior and impure coal are liable to be and will be deceived by the representations of the said defendant into purchasing the coal of defendant as your orator's superior and specially selected coal; and your orators aver and charge it to be a fact that purchasers have heretofore been so deceived, and that the reputation of your orator's 'Pocahontas' coal has thereby been tainted, and that the defendant intends to and will continue the aforesaid unlawful acts unless prevented by this Honorable Court; and that in this unlawful business the said defendant and his confederates are and have been engaged since about the month of November, 1896."

And these allegations are supported by numerous affidavits (Castner, Record, pages 14-15; Matson, Record, pages 34-35; Shirey, Record, pages 35-36; Hurst, Record, pages 37-38; Wilcox, Record, page 39; Calfee, Record, page 40; Sayers, Record, page 41; Stockham, Record, pages 42-43; Wales, Record, pages 43-44; Barney, Record, page 45; Claxton, Record, pages 46-47; Alkins, Record, pages 48-49; Mather, Record, page 51).

The above averments were not made in the bill of complaint in the "Lackawanna" case.

In the "Lackawanna" case, the court said:—

> *"It may be observed there is no averment that the other coal of the Lackawanna Valley differs at all in character or quality from that mined on the complainants' lands. On the contrary, the bill alleges that it cannot easily be distinguished therefrom by inspection. The bill is therefore an attempt to secure to the complainants the exclusive use of the name 'Lackawanna coal' as applied, not to any manufacture of theirs, but to that portion of the coal of the Lackawanna Valley which they mine and send to market, differing neither in nature or quality from all other coal of the same region.*
>
> *"Undoubtedly words or devices may be adopted as trade marks which are not original inventions of him who adopts them, and courts of equity will protect him against any fraudulent appropriation or imitation of them by others. Property in a trade mark, or rather, in the use of a trade mark or a name, has very little analogy to that which exists in copyrights or in patents for inventions. Words in common use, with some exceptions, may be adopted if at the time of their adoption they were not employed to designate the same or like articles of production. The office of a trade mark is to point out distinctively the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer. This may in many cases be done by*

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a name, a mark, or a device well known, but not previously applied to the same article. But though it is not necessary that the word adopted as a trade name should be a new creation, never before known or used, there are some limits to the right of selection. This will be manifest when it is considered that in all cases where rights to the exclusive use of a trade mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief."

In the "Columbia Mills" case, these averments were made, but were not properly supported by the proofs, for in the "Columbia" case this court said (page 467):—

"It is also shown by the testimony in this case that the flour manufactured from Spring wheat, such as that dealt in both by the complainant and the defendants, is never sold or bought simply on the brand, but usually, if not always, by actual sample, and the proof fails to establish that the brand of the appellees was calculated to mislead, or did actually deceive or mislead, any one into supposing that the flour of the complainant was being bought. So it cannot be said that the defendants were personating the complainants' business by using such a description or brand as to lead customers to suppose that they were trading with the appellant."

These averments, supported as they are by voluminous proof and practically uncontradicted by the defendant, are sufficient, we believe, to again distinguish the case at bar from the "Lackawanna" and "Columbia Mills" cases.

In a subsequent portion of this brief, the proofs relating to the defendant's infringing acts and conduct will be considered more in detail. It is sufficient to state here that enough is proven to show that there is an equity in the

bill of complaint which the Fourth Circuit failed to discover when it dismissed the bill of complaint and refused the petition for rehearing.

The bill of complaint (Record, page 3) also contains the following averment:—

> *"VIII. And your orators further show unto your Honors, that they have devoted much time and expended large sums of money in inspecting, selecting, grading, and otherwise maintaining the superior quality and purity of the said coal, whereby the same has acquired and now possesses a great reputation in the markets of the world under the name of 'Pocahontas' coal or 'Pocahontas' Flat Top coal, and has been and is much sought after under the name or trade-mark 'Pocahontas' by dealers and by the public; and your orators aver that by reason of the premises the sole and exclusive right to the use of the word-symbol 'Pocahontas' as a trade mark for coal is now vested in your orators, and is of great value to them in their said business."*

The affidavits of Castner (Record, pages 13, 14); Curran (Record, pages 32-34); Shirey (Record, pages 36, 37); Hurst (Record, pages 37, 38); and Wilcox (Record, page 39) support these averments and show that after the coal is mined and prior to its acceptance and sale by appellees and complainants, a rigid system of grading, selection and inspection is in use at each mine controlled by complainants, so that before its sale to the public the complainants' coal reaches a certain standard of excellence. The appellant's Exhibit "Iron Belt" at page 98, Record, likewise shows that such inspection is made and is necessary. And through complainant's excesive care in the selection, grading, and inspection of their coal, through the expenditure of upwards of $26,000, and through skill, industry, and extensive advertisements in pushing the sale of said coal, the complainants have succeeded in building up a trade for Pocahontas coal which amounts to three million tons a year.

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No such averment and no such proofs were offered in the "Lackawanna" case nor in the "Columbia Mills" case, and hence the case at bar can be again distinguished from both of said cases.

The present case, however, appears to be on all fours with the case of Menendez *vs.* Holt, 128 U. S., 514-525, in which Mr. Chief Justice Fuller, in his statement of the case, said of the complainants:—

> *"That they were the owners of a certain trade mark for flour which consisted of the fanciful words 'La Favorita,' which was originated by the firm and had been used by it for more than twenty years to distinguish a certain flour of their selection and preparation; that said firm at all times exercised great care in the selection, packing, and preparation of the flour packed and sold by them under the said brand 'La Favorita,' and has carefully advertised the same, and by their care and efforts extensively introduced it to the trade, so that the said brand had come to be widely known and sought after by the trade, and the sale of flour so branded constituted an important part of the firm's business."*

Under this statement of facts the defendants and appellants claimed that the words "La Favorita" were descriptive of the properties, style, or quality of the flour, and hence could not be appropriated as a trade mark. This contention was disposed of by the court in the following language:—

> *"The fact that Holt & Co. were not the actual manufacturers of the flour upon which they had for years placed the brand in question, does not deprive them of the right to be protected in the use of that brand as a trade mark.*
>
> *"They used the words 'La Favorita' to designate flour selected by them, in the exercise of their best judgment, as equal to a certain standard. The brand did not indicate by whom the flour was manufactured,*

but it did indicate the origin of its selection and classification. It was equivalent to the signature of Holt & Co. to a certificate that the flour was the genuine article which had been determined by them to possess a certain degree of excellence. It did not, of course, in itself indicate quality, for it was merely a fancy name and in a foreign language, but it evidenced that the skill, knowledge, and judgment of Holt & Co. had been exercised in ascertaining that the particular flour so marked was possessed of a merit rendered definite by their examination and of a uniformity rendered certain by their selection."

Having established satisfactorily, as we think, that the present case may be distinguished from the "Lackawanna" and "Columbia" cases, if the averments of the bill of complaint are true, the next question which naturally arises is as to whether or not the averments of the bill of complaint have been proven. In this connection this Honorable Court should not overlook the fact that the record is made up of *ex parte* affidavits which were used upon an application for a preliminary injunction. And the further fact should be considered that the Fourth Circuit has held, in substance, on the petition for rehearing, that even if the allegations or averments of the bill were satisfactorily proven, yet such proof could not avail as there is no equity in the bill as framed.

Whether the opinion of the Fourth Circuit upon the appeal be casually or carefully read, it is apparent that in that opinion the court held that the averments of the bill were not proven, but in the opinion upon the petition for rehearing, the Fourth Circuit burned all bridges and announced that its first opinion unqualifiedly meant that no geographical term or name could form the subject matter of a trade mark, irrespective of whether the term or name was adopted as a trade mark prior to its use as a geographical name or not.

Complainants aver that the South-West Virginia Improvement Company, from which they derive title to the

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trade mark by assignment, adopted the name "Pocahontas" as a trade mark early in the year 1882, and thereafter gave that name to its mines, its mining village, and its post office. Irrespective of the complainants' affidavits to this effect, the defendant has offered as an exhibit into this case a publication called the "Iron Belt," dated October, 1891, and extracts from that publication are printed at pages 97-102 of the Record. The following quotation (pages 99, 100) is sufficient, we believe, to confirm complainants' contention:—

> *"The developments in the Flat Top coal field started in the Fall of 1881, but only surface work on the side of the mountain was done. In January, 1882, about twenty miners were landed at the point in Tazewell County, Virginia, where now stands the town of Pocahontas, then a howling wilderness, having taken nine days to make the trip from New York, the greater part of the time having been consumed in making their way across the mountains from Wytheville. A place was cleared away and a shanty was erected, in which the men cooked their meals and had their sleeping apartments. The first work done by these men was the clearing of a passageway up Laurel Creek. This creek was so named from the large amount of laurel bush that lined the banks of the stream, and which, in some places, was so dense that it almost excluded daylight. Mr. William T. Moore, an old and respected citizen of Abb's Valley, tells of shooting an enormous bear on Laurel Creek one afternoon about sunset, and when he returned next day to secure his game he could not make his way to the spot on account of the denseness of the undergrowth. So much for this digression.*
>
> *"The wet season in the Spring of 1882 retarded the progress of the work, which was all out of doors, but in March, that year, the first blast was put in the east mine, and on April 1st Mr. Thomas C. Blair,*

now a successful capitalist of Roanoke, Va., closed a contract with the South-West Virginia Improvement Company to run the No. 1 east mine one mile, also the air course and the No. 1 west mine. The work was then pushed with vigor till Fall, when it was stopped for a time on account of the inability of the railroad to reach the mines, in consequence of all the coal taken from the mine being dumped in front of the opening.

"The New River Division of the Norfolk and Western Railroad was completed in 1883, and the first carload of the product of the new coal field was shipped through to Norfolk and distributed among the poor. When the car left Pocahontas it was decorated with branches of laurel, and as it passed through the various towns along the route, the people, realizing that the completion of the Norfolk and Western Branch road to the coal mines would mark the beginning of a new era in the history of our development, in their enthusiasm, draped the car with bunting and flags, and when it arrived at Norfolk it was one mass of red, white, and blue."

This Honorable Court will also see from the defendants' own showing that to the South-West Virginia Improvement Company in 1882, *"when the mines were first opened a shipment of two or three hundred tons per day was considered a great output."* (Record, page 100.)

The Fourth Circuit has stated (Record, page 155) that:—

> "The first coal sent to market, according to the evidence, was in July, 1883, at which date both the town of Pocahontas and the post office of the same name had been in existence for a year at least."

It is true that the first shipments of coal by rail from the mines to the seaport of Norfolk, Va., did not take place until 1883, because the railroad had not been completed until that year, but it is also true that the *very first*

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shipment placed upon the Norfolk market was sold as Pocahontas coal. Thus Lamb testifies (Record, page 60) that

> *"in 1883 he was appointed agent for the South-West Virginia Improvement Company for the sale of their coal mined in Tazewell County, Virginia, which coal was put upon the market as 'Pocahontas' coal."*

He produces a letter of E. S. Hutchinson (Record, pages 60, 61), a receipt (Record, page 61), and copies of certain invoices (Record, page 62) in corroboration of his testimony.

With regard to the existence of the town of Pocahontas and the post office of the same name, the defendants' exhibit from the "Iron Belt" has this to say (Record, page 100):—

> *"When the mines were first opened a shipment of two and three hundred tons per day was considered a great output, but when the big explosion took place in the year 1884, the daily output was many times greater than this. This explosion was beneficial to the new coal fields, inasmuch as it attracted the attention of the public to it. At that time there were thousands of people in the State who did not know there was such a place as Pocahontas, or had not heard of the wonderful developments going on there."*

This quotation from a magazine published in 1891, nearly six years before this suit was brought, is, we think, the very best evidence and was evidently overlooked by the Fourth Circuit, when, in its opinion (Record, page 155), it said:—

> "We are impelled to find from the testimony that in the early shipments of coal the word Pocahontas was used, not as a word-symbol or trade mark, but simply as the name of the town from whence it came,

> for the purpose only of pointing out the place of production. The coal had not then been used, and it had not produced the wonderful results that it subsequently did; its reputation had not been made, and it had not at that time found its way to the marts of the world—to the furnaces of land and sea."

It is further in evidence that the town of Pocahontas had no *legal* existence until January 31st, 1884, when it was incorporated by an Act of Assembly of the State of Virginia. This Act will be found at pages 55-59, Record. Before this incorporation the land, buildings, post office, mines, and accessories were all the property of the South-West Virginia Improvement Company, and the town of Pocahontas was as much their private estate as was "Glenfield," the private estate of the plaintiff in Wotherspoon *vs.* Currie, L. R., 5 H. L. App., 512. In commenting upon this "Glenfield" case, the Supreme Court of Pennsylvania in "Laughman's Appeal," 128 Penna. State Repts., pages 1-23, said (page 23):—

> *"It is doubtless true, as a general proposition, that the name of a private estate may be used by the owner as a trade name. The case just cited is an illustration in point; for the plaintiff, in that case, at first manufactured starch on the private estate of Glenfield, and called his starch 'Glenfield.' He removed from his private estate but retained for his starch manufactured elsewhere the same trade mark, and his right to do so was sustained."*

The record, we believe, sustains the proposition that the fame of the coal gave the name to the geographical locality—changed in fact the geographical name of Flat Top or Great Flat Top to that of "Pocahontas." A question then naturally arises as to whether or not the incorporation of the town of Pocahontas in 1884, and the subsequent use of the name of Pocahontas as a common appellation of the public for the district in which the coal is mined vitiates the petitioners' right to the word as a trade mark.

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As appears from the affidavits of Castner, Kimball, and Welch, previously referred to, in 1882, when the word "Pocahontas" was adopted by the South-West Virginia Improvement Company, the district or field in which the coal was found was a wilderness with no known appellation. In the latter part of the year 1884, even after the town of "Pocahontas" had been incorporated, the district or region was still known as the Great Flat Top Region. See Exhibit Contracts A and B, Record, pages 16 and 23.)

It is a fact that the region is still known geographically as the Great Flat Top District. (See defendant's advertisement, page 47, Record.) Still it may be conceded that at the present time this Great Flat Top Region is called by many the Pocahontas Coal Field. But under well-established decisions this SUBSEQUENT use by the public of "Pocahontas" to designate locality cannot avoid the rights of appellees to the word "Pocahontas" as a trade mark in the sale of coal. To this point the case of Celluloid Manufacturing Company *vs.* Cellonite Mfg. Co., 32 Fed Rep., 94, is directly applicable.

Mr. Justice Bradley, at page 98, thus enunciates the rule:—

> *"The complainant's assignors, the Hyatts, coined and adopted the word when it was unknown and made it their trade mark, and the complainant is assignee of all the rights of the Hyatts. When the word was coined and adopted it was clearly a good trade mark. The question is whether the subsequent use of it by the public, as a common appellative of the substance manufactured can take away the complainant's right. It seems to me that it cannot."*

Again, in Selchow *vs.* Baker, 93 N. Y., 59, the New York Court of Appeals, through Judge Rapallo, said:—

> *"Our conclusion is that where a manufacturer has invented a new name, consisting either of a new word or words in common use, which he has applied for the first time to his own manufacture, or to an article*

manufactured by him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not genuine, or descriptive of the article, its qualities, ingredients, or characteristics, but is arbitrary or fanciful, and is not used merely to denote grade or quality, he is entitled to be protected in the use of that name, notwithstanding that it has become so generally known that it has been adopted by the public as the ordinary appellation of the article."

See also—

Celluloid Mfg. Co. *vs.* Read, 47 Fed. Rep., 712-714;
Williams *vs.* Adams, 8 Biss., 452.

At the time in 1882 when the predecessors in interest of complainants and appellees adopted the word "Pocahontas" as their trade mark for coal, such adoption was the legitimate adoption of a fanciful name for a legitimate trade mark. At that time there was no geographical location implied by such selection. If since that time a geographical name has become coupled with the complainants' excellent product, the subsequent acts leading to such a geographical intermingling cannot vitiate the rights to the trade mark which were admittedly adopted and which were admittedly legitimate at the time of the adoption. If this were not the true rule, the Glenfield Starch case and the Celluloid decision would be erroneous in their conclusion, and any one could vitiate an existing valuable trade mark by simply starting a town or village or post office by the name of such valuable trade mark and sell his competing product by that name. Take, for example, the term "Apollinaris," which to-day appears to be a valuable trade name for certain mineral water. According to the theory of the defendant any one could now or hereafter, by merely naming a village "Apollinaris," sell some water from that village by that trade name. The weakness of defendant's case lies in this, that he overlooks the fact that at the time of *adoption* the term "Poca-

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hontas" was a valid trade mark; that in no manner have the complainants or their predecessors abandoned their rights to this trade mark, and that consequently no acts of others could in any manner oust them from its possession.

DEFENDANT'S ACTS.

Defendant admits that he has offered for sale and sold coal as "Pocahontas" (Exhibit K, pages 29, 30, Record; Exhibit I, page 31, Record).

The specific acts of the defendant complained of and proven by the Record are as follows:—

I. The selling and advertising for sale, at reduced prices, of inferior coal by defendant as the Pocahontas coal of complainant.

To prove this charge the complainants have introduced the affidavit of Castner (Record, page 14), who testifies:—

> *"That lately this deponent began to receive from the customers and agents of Castner & Curran and from others advices to the effect that 'Pocahontas' coal was being offered for sale at a reduced price, thereby lessening the sales of said agents; that immediately this deponent investigated the matter and found that one W. H. Coffman, of Bluefield, W. Va., was advertising, shipping, billing, and delivering coal mined in West Virginia at the Indian Ridge Mine, in an extension of the said Great Flat Top Coal Field, and inferior in quality to that dealt in by the said firm of Castner & Curran, which coal is designated and sold by the said W. H. Coffman as coal from the 'Pocahontas' Flat Top District, a district which in fact does not and never did exist; that the said Coffman has created in the minds of the public, dealers, and consumers of 'Pocahontas' coal the false impression or idea that the said Coffman has the right to sell and in fact is selling 'Pocahontas' coal."*

The affidavits of Mattson (Record, pages 34, 35); Calfee (Record, page 40); Sayers (Record, page 41); Stockham (Record, page 42); Wales (Record, pages 43, 44); Barney (Record, page 45); Claxton (Record, pages 46, 47); Alkins (Record, pages 48, 49); and many exhibits corroborate Mr. Castner's testimony in this regard.

II. The defendant has assumed the name of the Pocahontas Coke and Coal Company in order to further his schemes to deceive the public. It is admitted by defendant's answer (XIII., pages 85, 86, Record) that there is in fact no such "company."

III. Defendant has sold uninspected, unselected, and ungraded coal to customers as "Pocahontas" coal.

Upon this point the witness Shirey testifies in his affidavit (Record, page 36) as follows:—

> *"This deponent is familiar with the output of what is known as the Indian Ridge Mine; that previous to November 1st, 1896, the output of this mine was sold by Castner & Curran; that to render the coal from this mine fit for consumption a most rigid inspection was necessary prior to its shipment from the mine; that Castner & Curran had at this Indian Ridge Mine prior to November 1st, 1896, one sub-inspector and four assistants, that number being absolutely necessary to bring the output up to the standard of the other coal sold by Castner & Curran as 'Pocahontas' coal; that all coal from the Indian Ridge Mine prior to November 1st, 1896, was shipped by this deponent solely as 'run of mine' coal, for use for steaming and blacksmithing purposes, because there were no machinery or appliances at said mine, whereby said run of mine coal could be graded or assorted into lump and nut coal to be adapted for domestic uses, and which coal so assorted commands a better price than the run of mine coal upon the market; that since No-*

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vember 1st, 1896, Castner & Curran have not handled the coal of said Indian Ridge Mine, neither have they inspected the same, but a W. H. Coffman has handled this coal, and what inspection has been done has been at the instance of the mine operators, the Indian Ridge Coal and Coke Company; that this deponent has seen many cars of this coal so shipped by the said Coffman, and the quality of said coal is greatly inferior to the coal formerly shipped by this deponent for the said firm of Castner & Curran from the said Indian Ridge Mine; that deponent has seen coal shipped by said Coffman as lump, egg, or nut coal which was not lump, egg, or nut coal, but was simply run of mine of inferior quality and containing many impurities, such as bone coal, slate, and sulphur bands."

This is corroborated by the affidavits of Hurst (Record, page 38); Wilcox (Record, page 39); Calfee (Record, page 40); and Sayers (Record, page 41).

The affiants, Calfee and Sayers, are both coal dealers and they testify emphatically that the coal they bought of the defendant, Coffman, was *"unsatisfactory and full of impurities"* and was *"inferior in quality and purity to the 'Pocahontas' coal purchased from Castner & Curran."*

IV. The defendant in selling his coal has deceived the trade in that he has asserted that his coal so sold was the same as complainants' Pocahontas coal.

The affidavit of Calfee (Record, page 40) on this point is clear. He states:—

"That he is a resident of Wytheville, in the State of Virginia; that he is engaged in the coal and other mercantile business thereat; that heretofore he has purchased of Castner & Curran many tons of their 'Pocahontas' coal, which has uniformly given satisfaction; that on or about the thirteenth day of November, 1896, he received from the Pocahontas Coke and Coal Company, of Bluefield, W. Va., a postal

card soliciting an order for 'Pocahontas' coke, which postal was so worded as to lead this deponent to believe that he could purchase 'Pocahontas' coal from the said Pocahontas Coke and Coal Company, of Blue field, W. Va.; that in subsequent correspondence with W. H. Coffman, of said Pocahontas Coke and Coal Company, the said Coffman represented his alleged company's coal as 'Pocahontas' Coal, upon which representation this deponent purchased from said Pocahontas Coke and Coal Company about seventy-five tons of such coal; that the coal so purchased of the Pocahontas Coke and Coal Company was unsatisfactory, being full of impurities which are not present in the coal purchased by this deponent from the said Castner & Curran."

See also affidavit of Sayers. (Record, page 41.)

As to how the conduct of the defendant is viewed by his own agents, the following letter, printed at 123, Record, is instructive:—

"Rowe & Woodruff, dealers in coal, wood, coke, hay and "feed. W. Main St.

"Battle Creek, Mich., Dec. 3, 1896.

"Pocahontas Coal & Coke Co., Bluefield, W. Va.

"Gentlemen:—Enclosed find a copy of a communication which we fail to understand We have bought several cars of coal of you as Pocahontas coal, and have sold it as such We like your coal very well so far, and if we are to be protected in the sale of it; hope to do a very fair business with you. Of course our trade is not a large one, as this is a small city—about 18,000 but we have handled over 700 cars of coal in the last year, and some of our steam customers are leaning toward smokeless coal. We have heretofore used the Turkey Knob with excellent satisfaction, and have made no effort to obtain Pocahontas. A small firm, whose name and local

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reputation we will not here mention, have claimed to have the exclusive agency for Pocahontas coal and have been selling at a fancy figure, feeling confident that they had a monopoly on this coal; meantime, we have tried your coal and like it. We do not wish to get in any trouble, but perhaps we are unnecessarily alarmed. Will we be compelled to drop your coal, or will you protect us in selling what we buy as what we buy? Kindly give this your immediate attention, and oblige

"Yours very Resp'y.

"ROWE & WOODRUFF."

The evidence and exhibits in the present case undoubtedly show that the defendant is endeavoring to trade on the name of the complainants. If there existed any doubt in the mind of this court that the complainants had some property in and to the name "Pocahontas," which defendant wishes to appropriate, we believe the doubt will be dispelled upon glancing at the two advertising cards at pages 47 and 48 Record, and known as Exhibits O and P.

In the first of these exhibits, marked "O," the most prominent features of the card are the words "Pocahontas"and "Coal," and between these words in small and obscure type is the word "smokeless." In the second of these exhibits, marked "P," the words "Pocahontas" and "Coal" are most prominently displayed, whereas the words "Coke and Coal Co.'s Celebrated," between "Pocahontas" and "Coal," are in small and obscure type.

A reproduction of these two exhibits follow:—

EXHIBIT O.

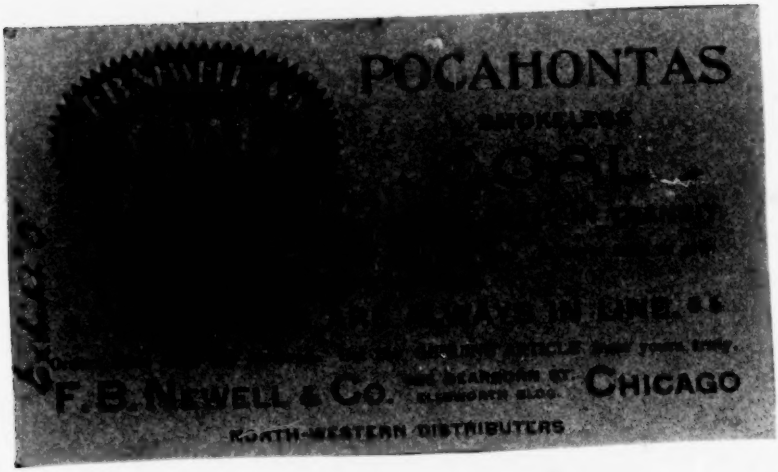

EXHIBIT O (Reverse Side).

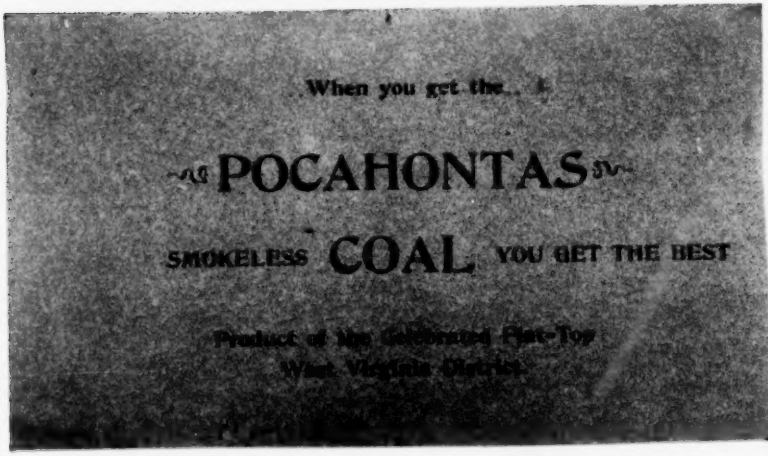

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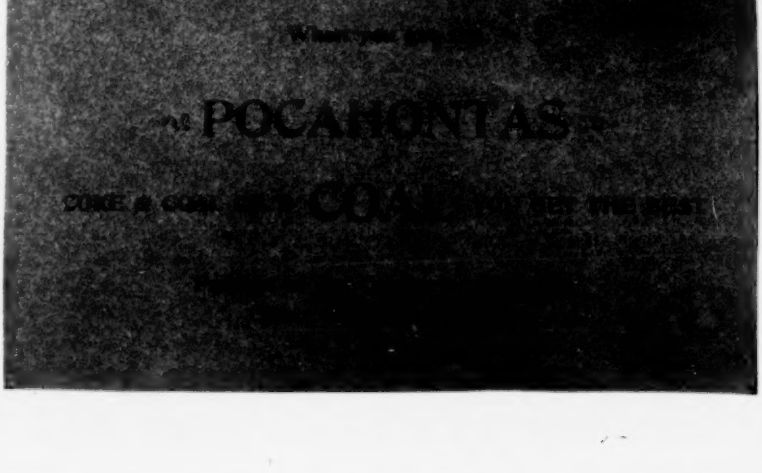
EXHIBIT P.

EXHIBIT P (Reverse Side).



The receipt marked "Exhibit K K" and Exhibit M," the receipt of the Franklin Fuel Company, in which coal is described as "Poca," are further evidence of Coffman's intent to deceive the public. (See pages 44, 50.)

As further evidence that the defendant is desirous of securing some of the advantages accruing to the complainants by virtue of their building up of an immense business under the trade mark "Pocahontas," the fact that the defendant appealed from the preliminary injunction order is significant.

That order (Record, page 146) in substance says to the defendant: You shall not be restrained from advertising your coal as coming from the Pocahontas coal field, but you must not sell your coal as the coal of complainants. If the defendant were honest in his pretensions then he should have been satisfied with this definition of his rights, which definition, we believe, has been uniformly laid down by this court in all cases of trade mark.

APPELLANT-DEFENDANT'S ASSIGNMENTS OF ERROR.

The assignments of error presented by the defendant as appellant to the Circuit Court of Appeals were in substance as follows (page 139, Record):—

I. That the Circuit Court erred in overruling the demurrer of the defendant.

II. That the Circuit Court erred in rendering any decree at all until the merits of the said cause, as put in issue by the pleadings, were fully developed by proofs adduced in the proper order of chancery proceedings and practice.

III. That the Circuit Court erred in entering the injunction order of May 5th, 1897, for the following reasons:—

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First.—Because the names "Pocahontas" and "Pocahontas Flat Top" are geographical names.

Second.—Because the "Pocahontas Section" is alleged to have an area of nine hundred and fifty-one square miles, of which the court is asked to take judicial notice.

Third.—That complainants cannot have the exclusive use of a trade name which would give them the monopoly in a geographical section in the sale of coal other than that handled by them, and such trade mark cannot consist of words in common use, as designating a locality, &c.

Fourth.—That words in common use are the common property of the people, and no one can acquire an exclusive right to such a word by adopting it as a trade mark; and that this is especially applicable to geographical names.

Fifth.—That the word "Pocahontas" is and for many years has been used as identifying a class of coal in a large region, and is descriptive of all the coal in that region.

Sixth.—That from necessity and for the information of the trade, the word "Pocahontas" is absolutely essential to and inseparably connected with the marketing of the coal from that field, and it has for years been used without objection in connection with every institution in the field, and its use is so large it cannot be controlled.

Seventh.—That the word "Pocahontas" has been used by individuals and corporations and institutions all over the country, and complainants are now estopped to claim it as their trade mark.

Eighth.—That complainants failed to show any priority of right to the trade mark.

Ninth.—No fraud was proven.

Tenth.—That complainants are endeavoring to monopolize the coal trade of that vast section.

Eleventh.—Complainants had used the name "Pocahontas" prior to purchase of same from South-West Virginia Improvement Company.

Twelfth.—The trade mark "Pocahontas" is historical and geographical, and was not originated by complainants.

Thirteenth.—That complainants falsely allege the right

to exclusive use of trade mark by reason of some peculiar inspection of the coal; that inspection does not change the coal, and would give no claim to a trade mark for raw material; that the inspection simply consisted in the elimination of foreign substances from the coal, which kind of inspection is common to mines everywhere, particularly this section, and which has been used by defendant's vendors.

Fourteenth.—Complainants have for years been selling as "Pocahontas" the same coal defendant now sells.

No specific disposition of these assignments of error was made by the Circuit Court of Appeals.

The Circuit Court of Appeals Erred in Dismissing the Bill of Complaint.

The appeal was taken by defendant to the Circuit Court of Appeals under section 7 of the Act of March 3d, 1891, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," as amended February 18th, 1895.

The decision of this court in Smith *vs.* Iron Works, 165 U. S., 518, settled the question that on appeal from an *interlocutory decree*, the Appellate Court may order that the bill be dismissed.

An interlocutory decree is final as to the matters decided by it, and interlocutory in the sense that the court requires proof as to damages and profits before passing a final decree.

It is entered only after a hearing before the court on full pleadings, and upon the depositions of witnesses who have been subjected to cross examination. It is thought a distinction should be made between such a decree and an order for an injunction, as in the present case. Here the questions are presented to the court for determination,

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substantiated only by *ex parte* affidavits. No chance for cross examining the defendant's witnesses was given to complainants.

The opinion of the Fourth Circuit, upon the appeal, commented at length upon the failure of complainants to prove material allegations of the bill. Thus, for instance, it is said (page 155, Record):—

> *"There is no evidence to sustain the allegations in the bill that the South-West Virginia Improvement Company began selling coal in the year 1882, from the 'Pocahontas' mine, nor that it made any sales of 'Pocahontas' coal in the year 1883, in the sense that those words are used in as a trade symbol."*

There is, however, in the record just such evidence. (Record, page 13, and defendants' Exhibit "Iron Belt," page 100 and page 103.) Even if the Fourth Circuit had deemed this evidence insufficient, there would be no warrant upon a motion for preliminary injunction to do aught further than to deny the motion and refuse the injunction until the case could be considered upon *proofs* at final hearing. (See Mayor of Knoxville *vs.* Africa, 23 C. C. A., 252, and also same case upon rehearing, page 262.)

In conclusion, we believe, that there is sufficient equity in the present case to sustain the bill of complaint and the preliminary injunction order heretofore granted thereon. The decree of the Circuit Court of Appeals for the Fourth Circuit should, therefore, be set aside and the injunction re-established.

Respectfully submitted,

HENRY E. EVERDING,
ARTHUR v. BRIESEN,
FREDERICK P. FISH,
Of Counsel for Petitioners.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

William C. Atwater & Co., et al., *Defendants, Appellants,* vs. *Samuel Castner, Jr.*, et al., *Complainants, Appellees.*	October Term, 1897. No. 239.

Appeal from the Circuit Court for the District of Massachusetts.

BEFORE PUTNAM, WEBB, AND BROWN, JJ.

OPINION OF THE COURT.

JUNE 1st, 1898.

PUTNAM, J.

This is an appeal from an order granting a temporary injunction, and relates to an alleged trade mark or trade name "Pocahontas" used in the coal traffic. This has been used for fully twenty years by the complainants below and their predecessors in title in a very extensive trade, with unbroken public acquiescence until the controversy out of which this litigation arose in this circuit and in the Fourth Circuit. It does not indicate merely that the complainants below are the producers of the coal sold, but quite as much that it is sorted and put on the market under their implied representation of uniform quality and excellence. In addition to the public acquiescence of which we have spoken, there had been, prior to the injunction order appealed from, an adjudication in the Circuit Court in the Fourth Circuit, sustaining the claimed trade mark or trade name and enjoining its infringement.

It is said that the complainants' coal, and also the alleged infringing coal, come from an extensive locality now generally known under the name of Pocahontas, and it is claimed that the case therefore falls within the rule of Canal Company *vs.* Clark, 13 Wall., 311, and Columbia Mills Company *vs.* Alcorn, 150 U. S., 460. But even if

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this were true in a general sense, it would remain to be considered whether the Supreme Court, in Singer Manufacturing Company *vs.* June Manufacturing Company, 163 U. S., 169, 203, 204, was not compelled to a qualification of the broad principle, claimed to have been stated in the cases referred to, as applied to trade marks and trade names which have been long and extensively used, and have become widely recognized by the public at large, even when they might not have originated in accordance with the ordinary rules of law. In that case the court found that some qualification of the rule that a word which indicates quality cannot be protected as a trade mark or trade name is necessary, at least in some classes of cases; and there is ground for maintaining that this applies with the same necessity to trade marks and trade names which represent well-known localities as to those of the character of that in question in that case. We do not, however, find it necessary to decide at present whether or not any qualification of that nature would be applicable to the case at bar, because so sharp a question does not now arise. Some of the reasons which render it necessary, under some circumstances, to protect, at least to a qualified extent, a trade mark of a geographical origin, were given by us in Levy *vs.* Waitt, 61 Fed. Rep., 1008, 1012.

The exact rule of Columbia Mills Company *vs.* Alcorn is implied in the following statement, at page 464:—

"The word 'Columbia' is not the subject of exclusive appropriation, under the general rule that a word or words in common use as designating locality or section of a country cannot be appropriated by any one as his exclusive trade mark."

This is explained in the same opinion, at page 465, by citing from Canal Company *vs.* Clark, *ubi supra*, the following expression:—

"The word 'Lackawanna' was not devised by the complainants. They found it a settled and known appellative of a district in which their coal deposits and those of others were situated. At the time they began to use it, it was

a recognized description of the region, and, of course, of the earth and minerals in the region."

It is necessary to recognize carefully the distinction which these expressions imply. Otherwise, a manufacturer, producer, or dealer who furnishes goods of such excellent quality that they build up so extensive a trade as to give a distinctive name to the locality where it is pursued, would be defeated of the just fruits of his industry and integrity by the very fact of his own meritorious conduct. Therefore, even under the rule as stated in the Columbia Mills Company *vs.* Alcorn, *ubi supra*, and without the qualification recognized in Singer Manufacturing Company *vs.* June Manufacturing Company, *ubi supra*, the case at bar as presented to the court below and also to this court, involves a difficult question of fact, to the effect whether at the time the trade mark or trade name in question was adopted the word Pocahontas was in common use as designating a known locality, or whether the locality gained its name from the complainants. Therefore, the Circuit Court was not met with a pure question of law, but with a mixed question of law and fact; and, by the well-settled principles touching the granting of temporary injunctions, the court was fully justified in its action by the long and unbroken public acquiescence, without reference to the adjudication in the Fourth Circuit to which we have referred.

The defendants below suggest that the acquiescence was not unbroken, as stated by us, because the affidavits show that there was one dealer, Browning, who shipped his coal as Pocahontas coal, but they also show that all such coal was plainly tagged as follows: "Pocahontas coal, from the Browning mines." This, so far from interrupting the public acquiescence to which we have referred, supported it by an evident attempt on the part of Browning to bring himself within the rule stated in Singer Machine Company *vs.* June Manufacturing Company.

Since the granting of the injunction in the case before us by the court below, and since the appeal to this court and the arguments at bar on the appeal, the Circuit Court

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of Appeals for the Fourth Circuit, in Coffman *vs.* Castner, by an opinion passed down May 3d, 1898, has held that the claimed trade mark or trade name Pocahontas cannot be sustained, and has reversed the adjudication of the Circuit Court to which we have referred, and has remanded the cause to that court with instructions to dismiss the suit. As the complainants in this case were the complainants in the case in the Fourth Circuit, it may be that if this had occurred before the action of the court below, now appealed from, no temporary injunction would have been granted. But, as the injunction was granted before the decision of the Circuit Court of Appeals was announced, the position is radically different. The order was clearly proper when made; and, if the circumstances remained unchanged, we could not reverse it. If the decision in the Fourth Circuit were in all respects final, we should hesitate to allow the injunction to continue, especially as the parties complainant are the same in each case. It is, however, not final, as it may be reversed, possibly, on a writ of *certiorari* from the Supreme Court. It would not be seemly for the courts in one circuit to grant, dissolve, and perhaps renew temporary injunctions according to varying conditions of litigations in other circuits; so that, as this injunction was clearly proper when granted, our only suitable course is not to interfere with it for any reason now apparent to us.

We, of course, do not mean to limit the usual powers of the court below over the injunction, as, while we accept the usual form of order, we attach to it the qualifications stated by us in Davis Electrical Works *vs.* Edison Electric Light Company, 60 Fed. Rep., 276, 282.

Some incidental matters were brought to our attention by the parties, but we believe all of them are rendered unimportant in view of the conclusions which we have stated. As neither party takes from our decision anything substantial, and as the circumstances are without precedent, we are not satisfied that equity requires that the appellants should pay the costs of this appeal.

The order appealed from is affirmed, neither party to recover costs of appeal.

NOTE BY THE COURT.—Pillsbury Washburn Flour Mills Co. *vs.* Eagle, 86 Fed. Rep., 608, which came to hand since our opinion was passed down, fully sustains our suggestions about trade names of geographical origin.

OPINION ON PETITION FOR REHEARING.

Atwater *et al.* vs. Castner *et al.* (Circuit Court of Appeals, First Circuit. November 17th, 1898). No. 239. Appeal from the Circuit Court of the United States for the District of Massachusetts. This was a suit to enjoin the infringement of an alleged trade mark or trade name in the word "Pocahontas," as applied to coal. The Circuit Court having made an order granting a temporary injunction, defendants took an appeal, and this court on June 1st, 1898, rendered an opinion affirming the order. 32 Circuit Court of Appeals, 77, 88 Fed., 642. The cause is now heard on a petition filed by the appellants, asking that the mandate be recalled and a rehearing ordered. Causten Brown and Jennings & Morton, for petitioners. Before PUTNAM, Circuit Judge, and WEBB and BROWN, District Judges.

PUTNAM, Circuit Judge: Our opinion on the merits of this appeal was passed down on June 1st, 1898, and the judgment in accordance therewith was entered on the same day. A mandate, pursuant to the judgment issued on June 9th, 1898, with the knowledge of appellants and without objection from them. On September 30th, 1898, during the term at which the judgment was entered and the mandate issued, the appellants filed with the clerk, without leave, a petition that the mandate be recalled and that a rehearing be ordered. The proceeding must be governed by the practice as it existed before the adoption at this term of amended rule 29. We have carefully examined the petition and the petitioners' brief, but none of the judges who concurred in the judgment desires that the case be argued anew. The ordinary judgment would be that the petition be denied, but, under the circumstances, the proper and more prudent course is to dismiss it. The petition that our mandate be recalled and a rehearing be ordered is dismissed.

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No. 113.

No. 113. October Term, 1899.

Office Supreme Court U. S.
FILED
JAN 3 1900
JAMES H. McKENNEY,
Clerk

Brf. of Everding, Briesen & Fish for

Supreme Court of the United States.

Petitioners

Filed Jan. 3, 1900.

Samuel Castner, Jr., and Henry B. Curran, trading under the firm name and style of Castner & Curran, Petitioners,

v.

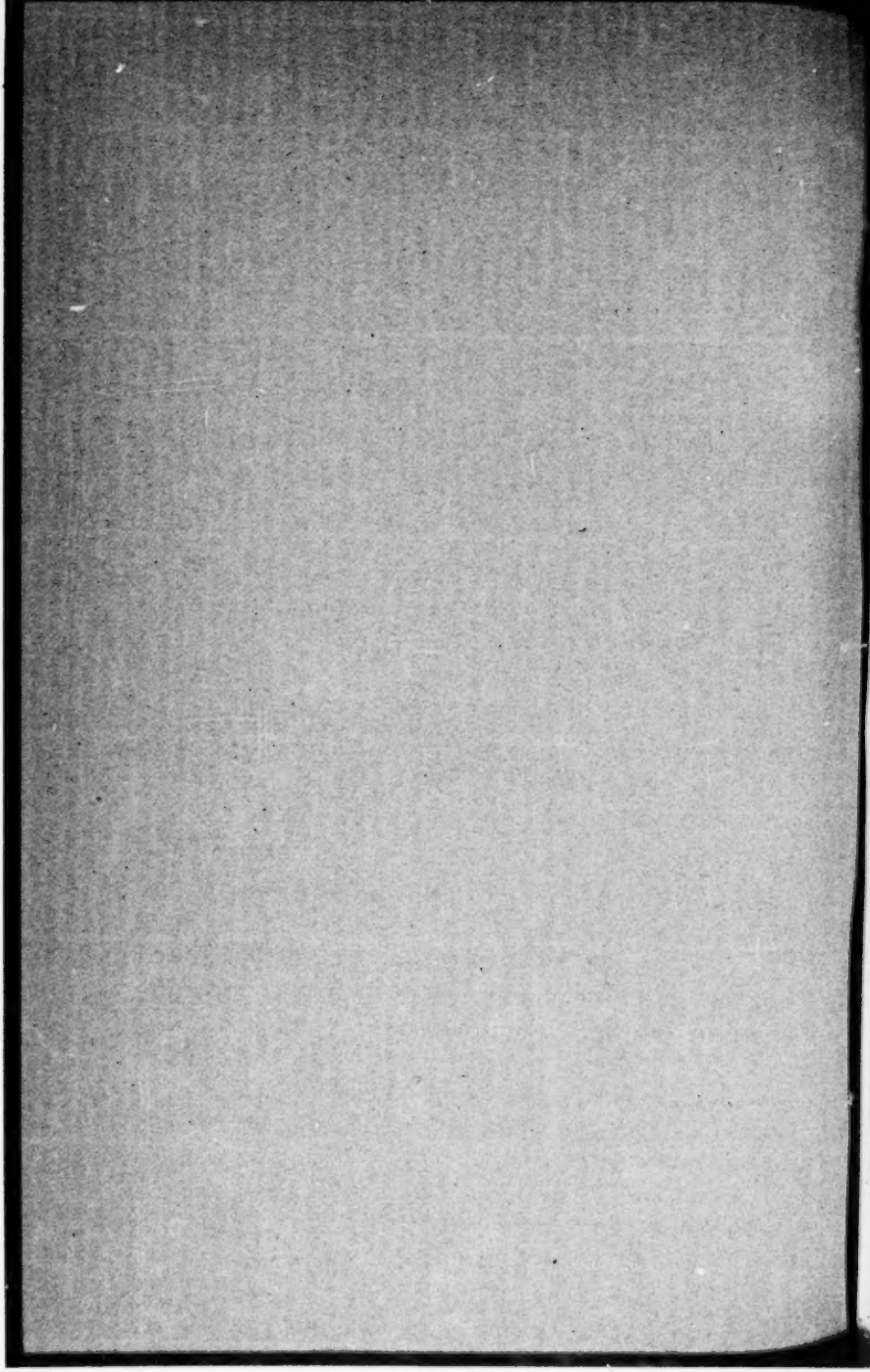
W. H. Coffman, doing business under the name and style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MEMORANDUM OF AUTHORITIES SUPPLEMENTAL TO BRIEF FOR PETITIONERS.

HENRY E. EVERDING,
ARTHUR v. BRIESEN,
FREDERICK P. FISH,
of Counsel for Petitioners.

Addison C. Getchell, Printer, Boston.



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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 113.

SAMUEL CASTNER, Jr., and HENRY B. CURRAN, trading under the firm name and style of CASTNER & CURRAN, Petitioners,

v.

W. H. COFFMAN, doing business under the name and style of POCOHONTAS COKE AND COAL COMPANY, and W. H. COFFMAN COKE COMPANY.

MEMORANDUM OF AUTHORITIES RELIED ON BY THE PETITIONERS.

A.

Authorities in support of the proposition that a word adopted as a trademark before it has any geographical significance remains a good trademark although it may afterwards become the name of a geographical district.

Atwater v. *Castner*, 88 Fed. Rep. 642 (1898), "Pocahontas Coal."

Williams v. *Adams*, 8 Biss. 452, 455 (1879), "Yankee Soap."

There is a complete analogy between these cases and those

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cases where trademarks have been protected, which, (1) subsequent to their adoption by the first user for some new article, have come to be the popular and generic term of description for such article.

Celluloid Mfg. Co. v. *Cellonite Mfg. Co.*, 32 Fed. Rep. 94, 98, "Celluloid."

Selchow v. *Baker*, 93 N.Y. 59, "Sliced Animals."

(These cases are referred to as "good law" by COLT, J., in *Indurated Fibre Co.* v. *Amoskeag Co.*, 37 Fed. Rep. 695.)

See also —

Celluloid Mfg. Co. v. *Read*, 47 Fed. Rep. 712.

Fairbank Co. v. *Lard Co.*, 64 Fed. Rep. 134, 136.

Or which, (2) subsequent to their adoption, have become a trade term denoting quality.

Burton v. *Stratton*, 12 Fed. Rep. 696, 702 (1882), "Twin Brothers' Yeast."

(This case was cited with approval by the United States Supreme Court in *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U.S. 537, 547.)

Practically all of the above cases are abstracted or referred to in petitioners' brief, so that they are merely cited in this memorandum.

B.

Authorities in support of the rule that, although a geographical word cannot be exclusively appropriated as a trademark, a defendant may nevertheless be restrained from using such a word without clearly and unmistakably distin-

guishing his goods from plaintiff's, if the word has acquired a secondary meaning signifying to the public that goods so marked are the plaintiff's goods.

I.

The underlying rule is laid down in *Perry* v. *Truefitt*, 6 Beav. 66 (1842), in which suit the plaintiff asked for an injunction restraining the defendant from using the words "Medicated Mexican Balm" on a preparation for the hair. It was said by Lord LANGDALE, M.R. (p. 73), —

> "I think that the principle on which both courts of law and of equity proceed in granting relief and protection in cases of this sort is very well understood. A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot therefore be allowed to use names, marks, letters or other *indicia* by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person."

In *Saxlehner* v. *Apollinaris Co.* [1897] 1 Ch. Div. 893, at 899, it was said by KEKEWICH, J., that —

> "The proposition that nobody has any right to represent his goods as the goods of somebody else has no limit as regards name, origin, honesty of manufacture or sale or otherwise. . . . It matters not, therefore, how a plaintiff's goods came to acquire a particular value or how a defendant's goods have come to adopt that value. If in fact the defendant is selling his goods as

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those of the plaintiff he is doing what the law will not allow."

So in *McLean* v. *Fleming*, 96 U.S. 245 (1877), where plaintiff sought to restrain defendant from using label similar to the plaintiff's, it was said by CLIFFORD, J. (p. 255), that —

> "Equity gives relief in such a case upon the ground that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity."

II.

Whether or not a particular defendant is passing his goods off as those of the plaintiff is, of course, a question of fact to be determined on the evidence.

In *Reddaway* v. *Banham* [1896] App. Cas. 199, it was said by Lord HALSBURY, L.C. (p. 204), that —

> "I believe the principle of law may be very plainly stated, and that is, that nobody has any right to represent his goods as the goods of somebody else. How far the use of particular words, signs or pictures does or does not come up to the proposition which I have enunciated in each particular case must always be a question of evidence; and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof; but if the proof establishes the fact the legal consequence appears to follow."

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III.

Authorities directly supporting the above proposition that where the name of a geographical district has become so associated with a complainant's goods as to indicate to the public that goods marked therewith are goods of the complainant and of no one else, the defendant, even though his goods are produced in the same district, will be restrained from using the name of the district in connection with his goods without clearly and unmistakably distinguishing the same from the complainant's goods.

In *American Waltham Watch Co.* v. *U.S. Watch Co.*, 173 Mass. 85; 53 N.E. Rep. 141; 43 L.R.A. 826 (1899), decided last March by the Supreme Court of Massachusetts, it was found by the court that —

> "The plaintiff was the first manufacturer of watches at Waltham and had acquired a great reputation before the defendant began to do business."

It was further found that —

> "The word 'Waltham' which originally was used by the plaintiff in a merely geographical sense, now, by long use in connection with the plaintiff's watches, has come to have a secondary meaning as a designation of the watches which the public has become accustomed to associate with that name."

In enjoining the defendant from using the words "Waltham" or "Waltham, Mass." on the plates of its watches "without some accompanying statement which shall clearly distinguish its watches from those made by the plaintiff," HOLMES, J., thus summed up the law of unfair competition so far as it applied to the case before him (at page 87 of 173 Mass.):

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"We think the cases show that the defendant fairly may be required to avoid deceiving the public to the plaintiff's harm, so far as is practicable in a commercial sense. It is true that a man cannot appropriate a geographical name; but neither can he a color, or any part of the English language, or even a proper name to the exclusion of others whose names are like his. Yet a color in connection with a sufficiently complex combination of other things may be recognized as saying so circumstantially that the defendant's goods are the plaintiff's as to pass the injunction line. *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.*, 168 Mass. 154, 156; 46 N.E. 386. So, although the plaintiff has no copyright on the dictionary, or any part of it, he can exclude a defendant from a part of the free field of the English language, even from the mere use of generic words, unqualified and unexplained, when they would mislead the plaintiff's customers to another shop. *Reddaway* v. *Banham* [1896] App. Cas. 199. So, the name of a person may become so associated with his goods that one of the same name coming into the business later will not be allowed to use even his own name without distinguishing his wares. *Brinsmead* v. *Brinsmead*, 13 Times Law R. 3; *Reddaway* v. *Banham* [1896] App. Cas. 199, 210. See *Singer Mfg. Co.* v. *June Mfg Co.*, 163 U.S. 169, 204; 16 Sup. Ct. 1002. *Cream Co.* v. *Keller*, 85 Fed. 643. *And so, we doubt not, may a geographical name acquire a similar association with a similar effect. Montgomery* v. *Thompson* [1891] App. Cas. 217.

"Whatever might have been the doubts some years ago, we think that now it is pretty well settled that the plaintiff, merely on the strength of having been first in

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the field, may put later comers to the trouble of taking such reasonable precautions as are commercially practicable to prevent their lawful names and advertisements from deceitfully diverting the plaintiff's custom."

In the *American Waltham Watch Co.* v. *Sandman*, 96 Fed. Rep. 330 (C.C. 1899), the facts were the same as in the Waltham Watch case decided by the Massachusetts court. Judge TOWNSEND says, —

> "It appears that originally the name 'Waltham' was thus used in a geographical sense, but by continued use it has acquired a secondary meaning as a designation of watches of a particular class, and purchasers have come to understand that watches stamped with the name 'Waltham' are watches made by complainant. . . . The controlling questions herein have been elaborately discussed by Judges KNOWLTON and HOLMES, of the Supreme Judicial Court of Massachusetts, in *American Waltham Watch Co.* v. *United States Watch Co.*, 53 N.E. 141; and in the views therein expressed I heartily concur. The ground of said decisions is that such conduct is in violation of the law against unfair trade, and is intended to deceive and defraud the public, and to deprive the complainant of the trade and good will to which it is entitled. . . . A decree may be entered for an injunction and an accounting."

See also —

Gebbie v. *Stitt*, 82 Hun, 93 (1894), "Deer River Plows," stated on page 15 of petitioners' brief.

Atwater v. *Castner*, 88 Fed. Rep. 642 (C.C. A. 1898.) (The opinion in *Atwater* v. *Castner* is printed at the end of petitioners' brief.)

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Besides these cases, directly asserting the above proposition as the ground of the decision, the same proposition is recognized in other American decisions.

In *Gage-Downs Co.* v. *Featherbone Corset Co.*, 83 Fed. Rep. 213 (C.C. 1897), it was said by SEVERENS, J. (p. 214), that —

> "There are many cases in which it has been held that the name of the place where goods are manufactured is not the subject of appropriation, and this may be said to be the general rule, and to be applicable where that is the sole feature of the trademark or trade-name, and where the name of the place is used in its primary signification. But the use of the name of a place may, under circumstances, be such as to denote to the eye and mind of the public the name of the person who has, perhaps, by long-continued business in that place, or long appropriation of that name, and being the only person there who has thus appropriated and used that name, produced goods which have gained their favor. In such circumstances the name of the place may acquire a secondary signification, and become, instead of denoting the place where the goods are manufactured, a mark denoting the manufacturer, and in such case, and in the circumstance where the name has thus acquired a secondary signification, a party may use it, and may be entitled, possibly, to its exclusive use. In such a case it depends entirely upon the proof, and, if it appears that the name is used for the purpose of denoting the place where the goods are made, — if this is the primary object, — then it is not subject to be appropriated by any one person resident there. All other residents have the like privi-

lege of use. But if the circumstances of the case show clearly that the use of that name is a means of appropriating the business advantages, good-will and tradename of the complainant, that is not lawful."

In *Metcalfe* v. *Brand*, 5 S.W.R. 733 (Ky. 1887), the court recognized that a geographical word might acquire a secondary significance, pointing only to the goods of a specific manufacturer. The court, however, stated that a geographical word could not acquire this significance for a natural product. This distinction, we submit, is unsound, inasmuch as it is a question of fact in each case whether or not the geographical word in question has obtained a secondary significance. What the court says, therefore, with respect to manufactured articles is equally true with respect to natural products. We quote from HOLT, J. (p. 778):

"Where the manufacturer has given it [*i.e.* a manufactured article] a geographical name, which he was the first to use in connection with the article, it seems to us that it may from long use in such connection acquire a *secondary* meaning, and instead of designating the place where the article is made, indicate its origin or that it is the product of a particular manufacturer, or made according to his method. Where this is the case, it becomes in our opinion, a valid trade mark. It then designates the *particular goods of this one man*. The public so understand it, and this is the end and aim of a trade mark. The name is no longer used to indicate the place where they are made, but becomes the *name of his goods*. It gives notice that he is the maker. It, by reason of first and continued use and association with the name of the article made or sold by him, acquires an understood reference to him. It is the trade denom-

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ination of *his* article. It acquires a secondary meaning in connection with a particular manufacture."

The principal proposition has been frequently laid down in English cases.

In *Wotherspoon* v. *Currie*, L.R. 5 H.L. Eng. & Ir. App. 508 (1872, "Glenfield Starch"), the plaintiffs had manufactured "Glenfield Starch" at Glenfield from 1847 to 1868, and "Glenfield Starch" had come to mean the plaintiffs' starch. The plaintiffs moved away in 1868, but continued elsewhere the manufacture of "Glenfield Starch." After the plaintiffs moved away, the defendant rented a part of the original manufactory at Glenfield and manufactured starch. He sold it with labels affixed, headed "Royal Palace Starch," and ending with "Currie & Co., Starch and Corn Flour Manufacturers, Glenfield." Despite the great dissimilarity between the plaintiffs' and the defendant's labels, the defendant's starch, owing to the presence of the word "Glenfield" on the label, was in some instances, if not generally, sold as "Glenfield Starch." The use of the word "Glenfield" was enjoined by the House of Lords, and Lord HATHERLY said (p. 518), —

> "I apprehend that the plaintiffs ask only what they have a right to ask, namely, an injunction to prevent the use of the name of Glenfield upon the labels. The offence consisted in putting upon the labels that which naturally led, and from evidence of suspicious conduct we are justified in saying was intended to lead, to the conclusion on the part of the public that when they buy the defendant's goods they are buying an article manufactured by the plaintiff; they are led to this conclusion in consequence of a name being used, the celebrity of

> which was first acquired by the plaintiff, and the value of which was first acquired by its being applied to the plaintiff's manufacture, which, of course, they think it continues to be."

Lord WESTBURY, in giving his reasons for granting an injunction, said (p. 521), —

> "I take it to be clear from the evidence that long antecedently to the operations of the defendant, the word 'Glenfield' had acquired a secondary signification or meaning in connection with a particular manufacture; in short, it had become the trade denomination of the starch made by the plaintiff. It was wholly taken out of its ordinary meaning and in connection with starch had acquired that peculiar secondary signification to which I referred."

An injunction was accordingly granted, restraining the defendant, in substance, from using the word "Glenfield" on any labels on starch manufactured by him; from in any other way representing starch manufactured by him to be "Glenfield Starch;" and from selling or causing the same to be sold as "Glenfield Starch;" and from doing any act or thing to induce the belief that starch manufactured by him is "Glenfield Starch," or starch manufactured by plaintiffs.

The very important case of *Montgomery* v. *Thompson* [1891] App. Cas. 217, "Stone Ale," is fully stated in petitioners' brief at pages 16 to 19.

See also —

Seixo v. *Provezende*, L.R. 1 Ch. App. 192 (1865), "Seixo Wine."

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[In this case defendant was enjoined from using the word "Seixo" without clearly distinguishing the same from the wine produced by Quinta do Seixo. This form of injunction is expressly approved in *Montgomery* v. *Thompson*, *supra*, and is also followed in *Reddaway* v. *Banham*, *infra*.]

Siegert v. *Findlater*, L.R. 7 Ch. Div. 801 (1878), "Angostura Bitters."

Huntley v. *Reading Biscuit Co.*, 10 R.P.C. 277 (1893), "Reading Biscuits."

Birmingham Vinegar Brewery Co. v. *Powell* [1897], App. Cas. 710, "Yorkshire Relish."

The rule laid down in the foregoing cases that where the name of a geographical district has become identified with the goods of a plaintiff, a defendant, although manufacturing or producing his goods in the same district, will be restrained from using the name of the district on his goods without clearly distinguishing them from those of the plaintiff, for the reason that otherwise his use of the name would untruthfully represent his goods to be those of the plaintiff, is only a logical and necessary application of the well-recognized rule that a defendant, manufacturing or producing his goods in a geographical district other than the plaintiff's, may be restrained from using on his goods the name of the plaintiff's geographical district. In both classes of cases a false representation is in fact being made, and as such will be enjoined.

In support of this last-mentioned rule, see —

Newman v. *Alvord*, 51 N.Y. 189 (1872), "Akron Cement."

Brahim v. *Beachim*, 7 Ch. Div. 848 (1878), "Radstock Colliery."

Association v. *Piza*, 24 Fed. Rep. 149 (C.C. 1885), "St. Louis Lager Beer."

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Lead Co. v. *Cary*, 25 Fed. Rep. 125 (C.C. 1885).

Pike Mfg. Co. v. *Stone Co.*, 35 Fed. Rep. 896 (C.C. 1888), "Lamoille Whetstones."

Lead Co. v. *Coit*, 39 Fed. Rep. 492 (C.C. 1888).

Gage-Downs Co. v. *Featherbone Corset Co.*, 83 Fed. Rep. 213 (C.C. 1897), "Chicago Waists."

Pillsbury-Washburn Flour Mills Co. v. *Eagle*, 86 Fed. Rep. 608 (C.C.A. 1898), "Minneapolis Flour."

Collinsplatt v. *Finlayson*, 88 Fed. Rep. 693 (C.C. 1898), "Plymouth Gin."

IV.

Closely analogous to the above cases are cases asserting the rule that where a personal name or a "generic" or a "descriptive" name, or a word or mark indicative of quality, which in and of itself cannot be monopolized as a technical trademark, has become so associated with the plaintiff's goods that such names or words when used in connection with the kind of goods made or sold by the plaintiff mean to the public generally the plaintiff's goods, the defendant, even though he be of the same name as the plaintiff, or though his goods would properly be described by the same "generic" or "descriptive" names, or their quality properly indicated by the use of the word or mark used by the plaintiff, did those names or words possess merely their ordinary significance, will be restrained from using such names or words in connection with his goods without clearly distinguishing his goods from those of the plaintiff.

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(*a*) Cases Dealing with Use of Defendant's own Name.

In *Pillsbury &c. Mills Co.* v. *Eagle*, 86 Fed. Rep. 608 (C. C. A. 1898), the close analogy between the use of personal names as a distinguishing mark on goods, and the use of geographical names for the same purpose, is clearly recognized. It was said by Bunn, J. (p. 627), that —

> "The cases in which a person has been enjoined from using his own name in connection with other labels or brands upon his goods proceed upon the same general ground of deceit and unfair competition in trade. If a person may be restrained from the use of his own name upon his own goods because such use, in the circumstances, will deceive the public into purchasing his goods believing them to be the goods of another, to the injury of the public and the good will and business of such other person, so, also, on the like principle, may he be restrained from using any other proper or geographical name when such use will produce like results."

In *Clark Thread Co.* v. *Armitage*, 74 Fed. Rep. 936 (C. C. A. 1896), plaintiffs manufactured spool cotton, and marked its spools "Clark's O.N.T. Spool Cotton." Defendant, who was selling agent of a recently incorporated "William Clark Co.," sold spools of cotton marked "Clark's N.E.W. Spool Cotton."

The Circuit Court (see 74 Fed. Rep. 943) enjoined the defendant —

> "against the use by labels, circulars, publication, or by word of mouth, of the designation 'Clark's' as the name or part of the name of the thread manufactured by the William Clark Company, and from selling thread manu-

factured by said company under the name of 'Clark's' or 'Clark's Spool Cotton' or 'Clark's Thread,' but did not restrain the use . . . of the corporate name of the William Clark Company, on labels or otherwise, provided that the word 'Clark' was not printed so as to be a practical violation of the rest of the injunction."

The Circuit Court of Appeals sustained the injunction. SHIPMAN, J., referring to the defendant's argument that inasmuch as the new corporation was entitled to use the corporate name, the defendant had a right to advertise and sell its thread as and for "Clark's Spool Cotton" and "Clark's Thread," states that (p. 943), —

"Assuming that the corporate name was not improper, *the fallacy of the defendant consists in the assertion that when he called the goods 'Clark's Spool Cotton,' he was simply telling the truth.* On the contrary, he was attempting to make the public believe that the goods belonged to another Clark, and there is evidence that the attempt was partially successful."

In *Walter Baker & Co.* v. *Sanders*, 80 Fed. Rep. 889 (C.C.A. 1897), complainants and predecessors had for many years manufactured chocolate and cocoa under the name of "Baker's Chocolate" and "Baker's Breakfast Cocoa." Defendant was the New York selling agent of a man by the name of Baker who began to manufacture chocolate and cocoa, and put it on the market under the name of "Baker's Chocolate" and "Baker's Breakfast Cocoa," using labels very similar to those used by complainants. It was said by LACOMBE, J. (p. 894), —

"Complainant's goods had become well known as

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'Baker's Chocolate,' and when 'Baker's Chocolate' was called for it was understood to be Walter Baker's chocolate that was intended. The public do not go into the minuter refinements of the title or the label. Whether it is described as 'Walter Baker's Chocolate,' or 'William Baker's Chocolate,' or 'W. H. Baker's Chocolate, or 'W. H. Baker's Best Chocolate,' so long as the title contains the words which in trade and among consumers have come to be the every day designation of complainant's goods, the chocolate so labeled will naturally be assumed to be complainant's unless special care be taken to indicate that it is not. . . . The complainant is entitled to relief against further use of a title which causes confusion, provided such relief can be granted without depriving W. H. Baker of the right to use his own name in connection with the chocolate business."

Defendant was accordingly enjoined (p. 895) —

"from using in connection with the business of making or selling chocolate, on labels, wrappers, cans, boxes, cakes, molds, signs, letter heads, bill heads or advertisements, or in any other manner whatsoever, the word 'Bakers,' 'Baker's,' or 'Bakers'' alone, or the word 'Bakers,' 'Bakers',' or 'Baker's' (whether the same be or be not coupled with other names or initials) in such a collocation with the word 'chocolate' (whether the same be or be not coupled with some further descriptive word or words) as to indicate that the chocolate so made or sold is a variety of 'Baker's Chocolate. But defendant may indicate thereon in appropriate language that the chocolate is made or prepared or sold for or by W. H. Baker, of Winchester, Va."

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But the court gave defendant his option of affixing upon every package bearing his infringing labels, in type as prominent as the title, the statement that —

> "W. H. Baker is distinct from and has no connection with the old chocolate manufactory of Walter Baker & Company."

In *Walter Baker & Co.* v. *Baker*, 87 Fed. Rep. 209 (C.C. 1898), defendant was a William P. Baker of New York. Complainants (who were also complainants in the preceding case) brought suit to restrain defendant from using words "Baker's Chocolate" and "Baker's Cocoa." It was said by SHIPMAN, J. (p. 210), —

> "The well-known short name by which the public styles the article of the complainant is 'Baker's Chocolate,' and thus the public regards what is presented under that name as the complainant's article, and associates the name with a particular factory of long existence and permanence. The defendant has a right to manufacture chocolate, and to acquire his own reputation under his own name, but not to use the name so as to deceive the purchaser. *When he presents his article as W. P. Baker's Chocolate, he not only improperly works mischief to the pre-existing manufacturer, but he wrongs the public, because he does not accompany his name with such indications that the thing manufactured is the work of the one making it as will unmistakably inform the public of that fact.*"

The court accordingly granted an injunction in precisely the same terms as that granted in the preceding case of *Baker & Co.* v. *Sanders*, with, however, this addition:

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> "From using, as aforesaid, the initial 'W.,' in combination with the name 'Baker;' but the defendant may use his full name, 'William Phillips Baker,' or 'William P. Baker,' in conformity with this decree."

The court explained this additional clause of the injunction as follows (p. 211): —

> "I do not perceive any good reason why a newcomer in the chocolate business, who desires to use his own name of 'Baker,' should use it in the form which most closely resembles the well-known name of another manufacturer. Under the name of 'William P. Baker,' the defendant can gain his own reputation, and enjoy the benefit of his own name."

In *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. Div. 748 (C.A. 1880), plaintiffs and their predecessor had manufactured "Thorley's Food for Cattle" for twenty-one years. Defendant company took the name of a man named Thorley and manufactured the same preparation under the same name as plaintiffs. It was said by BRAMWELL, L.J. (p. 760), —

> "It is said that it is hard if a man has the name of Thorley that he cannot make food and sell it as Thorley's Food. So he may, but if unfortunately for him some preceding Thorley has carried on the business of making cattle food in such a way that by the name 'Thorley's Cattle Food' is understood the manufacture of that man, then the second Thorley . . . must take care so to conduct his business as not to be mistaken for the original Thorley, and if he carries on his business so as to be mistaken, he must be restrained from doing it."

BLEED.

An injunction was accordingly granted restraining the defendant generally —

> "from in any manner representing or causing or procuring to be represented any goods by the defendant company as the manufacture or goods . . . of the plaintiffs."

And more specifically restraining the defendant —

> "from affixing . . . to any goods or articles manufactured . . . or sold . . . by the defendant . . . any labels, wrappers, or marks, . . . so contrived and prepared as to represent or lead to the belief that the goods or articles manufactured or sold . . . by the defendant . . . are the goods or manufacture of the . . . plaintiffs."

See also —

Wm. Rogers Mfg. Co. v. *R. W. Rogers Co.*, 66 Fed. Rep. 56 (C.C. 1895); affirmed on appeal, 70 Fed. Rep. 1017.

Walter Baker & Co. v. *Baker*, 77 Fed. Rep. 181 (C.C. 1896).

Allegretti Chocolate Cream Co. v. *Keller*, 85 Fed. Rep. 643 (C.C. 1898).

Garrett v. *Garrett*, 78 Fed. Rep. 472 (C.C.A. 1896).

Arnheim v. *Arnheim*, 58 N.Y. Sup. 948 (N.Y. Sup. Ct. 1899).

Stuart v. *Stewart Co.*, 91 Fed. Rep. 243 (C.C.A. 1899).

Robinson v. *Storm*, 52 S.W. Rep. 880 (Tenn. 1899).

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Croft v. *Day*, 7 Beav. 84 (1843).
Brinsmead v. *Brinsmead*, 13 The Times, L.R. 3 (1897).
Pinet v. *Pinet* [1898] 1 Ch. Div. 179.

In several of these "personal name" cases the courts have thought it expedient to compel the defendant to place upon his goods some such inscription as "No connection with the original A B," in order to prevent the likelihood of a continued deception of the public.

In *Baker* v. *Sanders*, 80 Fed. Rep. 889 (C.C.A. 1897), the defendant was given his option, as stated *supra*, pp. 16, 17 of obeying the injunction against the continued use of his infringing labels, or of affixing upon every package bearing those labels, in type as prominent as the title, the statement that —

> "W. H. Baker is distinct from and has no connection with the old chocolate manufactory of Waiter Baker & Company."

In *Allegretti Chocolate Cream Co.* v. *Keller*, 85 Fed. Rep. 643 (C.C. 1898), LACOMBE, J., granted a preliminary injunction —

> "restraining the defendant, Keller, from selling the candies of Allegretti & Co., in packages bearing the name, 'Allegretti,' unless such name be accompanied with the statement: 'No connection with the original Allegretti of Chicago'; and . . . from using the said name in signs or advertisements unaccompanied with a like statement."

In *Brinsmead* v. *Brinsmead*, 13 The Times, L.R. 3 (C. A. 1896), the defendants were enjoined by the English

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Court of Appeals from using the name "Brinsmead" (although that was their name) in connection with the sale, manufacture or hiring of pianos, without adding an express statement that they were distinct from and had no connection with the old firm of John Brinsmead & Sons. A. L. SMITH, L.J., added that *this order* (which was granted in the first instance by NORTH, J., in the lower court) "*was in an excellent form and according to his experience it was a common form.*"

(*b*) CASES DEALING WITH USE OF "GENERIC" OR "DESCRIPTIVE" NAMES.

In *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U.S. 169 (1896), the plaintiff company had long manufactured "Singer" sewing machines under patents which gave it an exclusive right to manufacture that type of machine. After the expiration of the patents, defendant company manufactured similar machines, stamping them with the word "Singer." Plaintiff brought suit to enjoin defendant's use of this word. The court held (p. 183) that on the expiration of the patents, the word "Singer" became the generic description of the type of machine previously manufactured exclusively by the plaintiff company under its patents, *but that in a secondary sense the word "Singer" did mean to the public machines manufactured by the plaintiff company, and so was an indication of source of origin.*

It was said by Mr. Justice WHITE (p. 187) that —

> "It is obvious that if the name dedicated to the public, either as a consequence of the monopoly or by the voluntary act of the party, has a twofold significance, one generic and the other pointing to the origin of manufacture and the name is availed of by another

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without clearly indicating that the machine, upon which the name is marked, is made by him, then the right to use the name because of its generic signification, would imply a power to destroy any good will which belonged to the original maker. It would import, not only this, but also the unrestrained right to deceive and defraud the public by so using the name as to delude them into believing that the machine made by one person was made by another.

"To say that a person who has manufactured machines under a patented monopoly can acquire no good will, by the excellence of his work, or the development of his business, during the patent, would be to seriously ignore rights of private property, and would be against public policy, since it would deprive the one enjoying the patent of all incentive to make a machine of a good quality, because at its termination all the reputation or good will resulting from meritorious work would be subject to appropriation by every one. On the other hand, to compel the one who uses the name after the expiration of the patent, to indicate that the articles are made by himself, in no way impairs the right of use, but simply regulates and prevents wrong to individuals and injury to the public.

"This fact is fully recognized by the well settled doctrine which holds that although 'every one has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which those having a common right are subjected is *damnum absque injuria*. But although he may thus use his name, he cannot resort to any artifice or do any act

calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name.' *Russia Cement Company* v. *Le Page*, 147 Mass. 206, 208; *Pillsbury* v. *Pillsbury*, 24 U.S. App. 395, 404; *Croft* v. *Day*, 7 Beavan, 84; *Holloway* v. *Holloway*, 13 Beavan, 209; *Wotherspoon* v. *Currie*, L.R. 5 H.L. 508; *Montgomery* v. *Thompson* [1891] App. Cas. 217; *Howard* v. *Henriques*, 3 Sandf. (N.Y.) 725; *Meneely* v. *Meneely*, 62 N.Y. 427; *Lawrence Manufacturing Company* v. *Tennessee Manufacturing Company*, 138 U.S. 537; *Brown Chemical Company* v. *Meyer*, 139 U.S. 540; *Coates* v. *Merrick Thread Company*, 149 U.S. 562. Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication, in itself amounts to an artifice calculated to produce the deception alluded to in the foregoing adjudications."

And again (p. 199):

"Where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created. Where another avails himself of this public dedication to make the machine and use the generic designation, he can do so in all forms with the fullest liberty, by affixing such name to the machines, by referring to it in advertisements and by other means, subject, however, to the

> condition that the name must be so used as not to deprive others of their rights or to deceive the public, and, therefore, that the name must be accompanied with such indications that the thing manufactured is the work of the one making it as will unmistakably inform the public of that fact."

The decree of the court below, dismissing plaintiff's bill, was accordingly reversed, and the defendant was enjoined (p. 204), —

> "First, from using the word 'Singer' or any equivalent thereto, in advertisements in relation to sewing machines, without clearly and unmistakably stating in all said advertisements that the machines are made by the defendant, as distinguished from the sewing machines made by the Singer Manufacturing Company; second, also, perpetually enjoining the defendant from marking upon sewing machines or upon any plate or device connected therewith or attached thereto the word 'Singer,' or words or letters equivalent thereto, without clearly and unmistakably specifying in connection therewith that such machines are the product of the defendant or other manufacturer, and therefore not the product of the Singer Manufacturing Company."

In *Reddaway* v. *Banham* [1896], App. Cas. 199, it appeared that from 1879 to 1889 appellant (plaintiff below) manufactured belting from camel's hair and called it "Camel Hair Belting" (which name he stamped on the belting). Up to 1889 he was the first and only manufacturer so to do. In 1889 respondent began making the same sort of article and stamped "Camel Hair Belting" thereon, and sold it under that name.

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In trial court the jury found that "Camel Hair Belting" meant to purchasers generally plaintiff's belting, and did not mean belting made out of camel's hair; that defendant's description of its belting was likely to mislead purchasers and to lead them to buy defendant's belting as and for plaintiff's belting; and that defendant endeavored to pass off its belting as the plaintiff's.

In the House of Lords the proof was accepted as satisfactory that "camel hair" belting had come to have a secondary significance, and to mean to purchasers generally the plaintiff's belting.

It was said by Lord HALSBURY, L.C. (p. 204), —

> "For myself, I believe the principle of law may be very plainly stated, and that is, that nobody has any right to represent his goods as the goods of somebody else. How far the use of particular words, signs, or pictures does or does not come up to the proposition which I have enunciated, in each particular case, must always be a question of evidence; and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof; but if the proof establishes the fact the legal consequence appears to follow."

It was said by Lord HERSCHELL (p. 210), —

> "The name of a person or words forming part of the common stock of language may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A, when he was really getting the goods of B.

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In a case of this description, the mere proof by the plaintiff that the defendant was using a word or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff. If he could succeed in proving this, I think he would on well established principles be entitled to an injunction."

And again (p. 212):

"I rather demur . . . to the statement of JAMES, L.J. [*i.e.*, in *Massam* v. *Thorley's Cattle Food Co.*], that the defendant in *Wotherspoon* v. *Currie* was not telling a lie in calling his starch 'Glenfield Starch,' as I do to the view that the defendants in this case were telling the simple truth when they sold their belting as camel hair belting. I think the fallacy lies in overlooking the fact that a word may acquire in a trade a secondary signification differing from its primary one, and that if used to persons in the trade who will understand it and be known and intended to understand it in its secondary sense, it will be none the less a falsehood that in its primary sense it may be true. A man who uses language which will convey to persons reading or hearing it a particular idea which is false, and who knows and intends this to be the case, is surely not to be absolved from a charge of falsehood because in another sense which will not be conveyed, and is not intended to be conveyed, it is true."

And again (p. 214):

"What right, it was asked, can an individual have to

> restrain another from using a common English word because he has chosen to employ it as his trademark? I answer he has no such right; but he has a right to insist that it shall not be used without explanation or qualification if such a use would be an instrument of fraud."

The injunction accordingly restrained —

> "defendants and each of them from using the words 'camel hair' as descriptive of, or in connection with, belting manufactured by them, or either of them, or belting (not being of plaintiff's manufacture) sold or offered for sale by them or either of them without clearly distinguishing such belting from the belting of the plaintiffs."

See also —

Cochrane v. *MacNish* [1896], App. Cas. 225 (P.C.) "Club Soda."

(*c*) Cases Dealing with use of Words or Marks Indicative of Quality.

In *Dennison Mfg. Co.* v. *Thomas Mfg. Co.*, 94 Fed. Rep. 651 (1899), decided by the Circuit Court for the District of Delaware only last May, the complainant's bill alleged in effect that certain marks, originally adopted by it to denote the size and quality of its various tags and labels, had become so identified with its goods that defendant, by copying the marks, deceived the public into thinking defendant's goods were goods of the complainant, and that the complainant was thereby damaged. Defendant demurred, on the ground that complainant could have no relief against the use by others of marks indicative of quality. In overruling the demurrer, Bradford, J., though admitting that a mark indicating

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quality cannot be exclusively appropriated as a technical trademark, held that because of the significance which these marks, through association with the complainant's goods, had acquired, the complainant had made out a case entitling it to relief against the defendant's acts. BRADFORD, J., says (p. 569), —

> "This doctrine [*i.e.* the restraint of unfair competition] rests on the broad proposition that equity will not permit any one to palm off his goods on the public as those of another. The law of trade-marks is only one branch of the doctrine. But while the law of trade-marks is but part of the law of unfair competition in trade, yet when the two are viewed in contradistinction to each other an essential difference is to be observed. The infringement of trade-marks is the violation by one person of an exclusive right of another person to the use of a word, mark, or symbol. Unfair competition in trade, as distinguished from infringement of trade-marks, does not involve the violation of any exclusive right to the use of a word, mark, or symbol. The word may be purely generic or descriptive, and the mark or symbol indicative only of style, size, shape, or quality, and as such open to public use 'like the adjectives of the language,' yet there may be unfair competition in trade by an improper use of such word, mark, or symbol. Two rivals in business competing with each other in the same line of goods may have an equal right to use the same words, marks, or symbols on similar articles produced or sold by them respectively, yet if such words, marks, or symbols were used by one of them before the other, and by association have come to indicate to the public that the goods to which they are

applied are of the production of the former, the latter will not be permitted, with intent to mislead the public, to use such words, marks, or symbols in such a manner, by trade dress or otherwise, as to deceive or be capable of deceiving the public as to the origin, manufacture or ownership of the articles to which they are applied; and the latter may be required, when using such words, marks, or symbols, to place on articles of his own production or the packages in which they are usually sold something clearly denoting the origin, manufacture or ownership of such articles, or negativing any idea that they were produced or sold by the former."

The decision in the foregoing case relies largely on *Reddaway* v. *Banham*, and the Singer case, *supra*.

V.

In order for the plaintiff to obtain relief under the principles laid down in the Singer case and the other cases cited above, it is unnecessary to show that defendant's deception of the public was fraudulently conceived.

In *Singer Co.* v. *Loog*, 18 Ch. Div. 395 (C.A. 1880), COTTON, L.J., says, —

"It is unnecessary that a fraudulent intention in issuing the circulars complained of, should be established. If the natural consequence of those things, even in circumstances not known to him (the defendant), is that they will represent the goods to be those of another person, it is wrongful."

In *Powell* v. *Birmingham Co.* [1896] 2 Ch. Div. 54, A. L. SMITH, L.J., says (p. 87), —

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> "The learned judge [*i.e.*, in the trial court] has not passed his judgment upon the ground of intention to deceive, but upon the ground that the defendant's acts were calculated to deceive, which of itself is sufficient to support the injunction irrespective of whether there was any intention to deceive or not."

In *Tarrant & Co.* v. *Hoff*, 76 Fed. Rep. 959 (C.C.A. 1896), "Hoff's Malt," the Court of Appeals (consisting of WALLACE, LACOMBE, and SHIPMAN, JJ.), in restraining defendant from labelling his bottles of malt with his own name, "Hoff," without distinguishing the same from complainant's malt sold under that name, said (p. 961), —

> "Courts in such cases do not require proof of any peculiarly iniquitous 'perfidious dealing.' If the representation as to what or whose the goods are is calculated to deceive the purchaser into buying them as goods of the complainant, equity will enjoin its continuance, although the 'deceitful representation' was placed upon them carelessly, or from lack of appreciation of the meaning it would convey to the purchaser, or from an honest mistake as to defendant's right to use it."

The above remarks were made, evidently, with reference to the dictum in *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U.S. 537, at 551, that in cases of "unfair competition," *i.e.*, where no technical trademark is involved, the defendant's "deceitful representation or perfidious dealing must be made out or be clearly inferable from the circumstances."

In *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U.S. 169, 199, 200, it is evident that, although defendant is found to have had a fraudulent intent, the court would have enjoined it had the fraudulent intent been absent. The word "Singer"

here was generic, but, nevertheless, in a *secondary* meaning, designated complainant's goods. The court held that complainant had no technical trademark in the word; that complainant was entitled to relief only upon the ground of unfair competition, and that defendant accordingly could use the name for its machines with the fullest and freest liberty, —

> *"subject however to the condition that the name must not be so used as to deprive others of their rights or to deceive the public and therefore that the name must be accompanied with such indications that the thing manufactured is the work of the one making it as will unmistakably inform the public of that fact."*

This summing up of the law excludes a fraudulent intent as a necessary element of unfair competition. It is simply necessary to show that the defendant's acts — whether the motive be fraudulent or innocent — "deceive the public," and so "deprive others of their rights." It is the result of defendant's acts, *i.e.*, deception of the public, and the consequent infringement of complainant's rights, not his intent or motive, that determines his liability. See *Tarrant* v. *Hoff*, *supra*.

See also —

Reddaway v. *Bentham Co.* [1892] 2 Q.B. 639, 644, 646, 648.

Valentine Co. v. *Valentine Co.*, 16 The Times, L.R. 33 (1899).

It is sometimes said in speaking of cases of this sort that defendant is liable only in case he has been acting fraudulently. What fraud is actually required, may be gathered from the following cases:—

In *Cochrane* v. *MacNish* [1896] App. Cas. 226, defend-

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ants were enjoined from using the words "Club Soda" upon their soda water. They urged that club soda was a descriptive phrase, and that they had no intent to deceive the public or to palm off their goods as the plaintiffs'. Court found that the phrase "Club Soda" had come to mean plaintiffs' soda, and that those words, as used by the defendants, were calculated to deceive, despite a wide dissimilarity between the labels on the plaintiffs' and defendants' bottles outside the use of this phrase.

Lord MORRIS said (p. 230), —

> "The respondents erred unwittingly at first, but as they persisted in their error after their attention was called to the fact that they were infringing the appellant's rights, their conduct in the eye of the law amounts to fraud and they must be held responsible for the consequences."

In *Singer Machine Manufacturers* v. *Wilson*, 3 App. Cas. 376 (1887), Lord CAIRNS, L.C., said (p. 391), —

> "What the motive of the defendant may be, the court has very imperfect means of knowing. If he was ignorant of the plaintiff's rights in the first instance, he is, as soon as he becomes acquainted with them and perseveres in infringing upon them, as culpable as if he had originally known them."

In *Mitchell* v. *Henry*, 15 Ch. Div. 181 (C.A. 1880), it is said by JAMES, L.J. (p. 191), —

> "The defendants must bear in mind that the original honesty of intention does not protect the continued user, if the user is found practically to have the result of deceiving or is calculated to deceive purchasers."

In *Orr, Ewing & Co.* v. *Johnston Co.*, 13 Ch. Div. 434 (C.A. 1880), it is said by JAMES, L.J. (p. 453), —

> "The moment that attention of the defendants, or any persons in their position, was called to the fact of the similarity of the two marks, and to the complaint of the persons who owned the first mark, that it was likely to injure them, it was his duty to immediately discontinue the use of the trademark complained of, and however honest or inadvertent the original mistake may have been, the continuation of the use of it after that was pointed out, is itself sufficient evidence of a fraudulent intention. The fraud would then consist in continuing to do it, even if there had been original inadvertence in the use of it."

In *Army &c. Society* v. *Army &c. Society of India*, 8 R.P.C. 426 (1891), it is said by KEKEWICH, J. (p. 429), —

> "I think they [*i.e.*, the defendants] must bear in mind that however innocent an act may be, the rule of the court has always been — as it must always be the rule in morals — that a man who insists upon doing a wrong act after it has been pointed out to be wrong, loses the benefit of his plea of original innocence."

In *N.E. Co.* v. *Marlborough Co.*, 168 Mass. 154 (1897), it is said by HOLMES, J. (p. 155), —

> "It is found that the defendant did not intend to deceive the public by passing off their goods for the plaintiff's, but this must be taken pretty strictly. They knew that they were putting the power to do so into the retail dealers' hands. It hardly can be doubted that they

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contemplated that the wholesale dealer, at whose request they put up their awls in this form, with full knowledge of the plaintiff's prior use, would or might try to deceive the public, and whether they did or not is immaterial. They knew it after they were warned by the plaintiff and stood upon their rights."

In *Manitowoc Co.* v. *Numsen*, 93 Fed. Rep. 196 (C.C.A. 1899), the judges adopt the phraseology of Judge JENKINS in the Circuit Court as follows: —

"A man may not use his own name to accomplish a a fraud, neither can he use a synonym, nor can he use the name of the city where he lives or its nickname, to accomplish a like purpose. It is always a question of fraud, but not necessarily of actual fraud. The act, however innocent, is considered constructively fraudulent if the result would tend to unfair trade, to confusion of goods and to interference with the rights of another."

See also —

Hendricks v. *Montague*, 17 Ch. Div. 638, 646, 647, 651 (C.A. 1881).

Saxlehner v. *Apollinaris Co.* [1897] 1 Ch. Div. 893, 900.

Millington v. *Fox*, 3 My. & Cr. 338 (1838).

Powell v. *Brewery Co.* [1896] 2 Ch. Div. 54, 67, 68, 82.

Le Page Co. v. *Cement Co.*, 51 Fed. Rep. 941 (C.C.A. 1892).

Stuart v. *Stewart Co.*, 91 Fed. Rep. 243, 246, 248, (C.C.A. 1899).

Robinson v. *Storm*, 52 S.W. Rep. 880 (Tenn. 1899).

C.

Authorities in support of the proposition that upon appeal from an order granting a preliminary injunction, the appellate court may reverse the order, but will not dismiss the bill.

I.

"The forms and modes of proceedings in suits of equity . . . in the Circuit and District Courts shall be according to the principles, rules and usages which belong to courts of equity . . . except when it is otherwise provided by statute or by rules of court made in pursuance thereof."

Rev. Sts. U.S. § 913.

"This act has been generally understood to adopt the principles, rules and usages of the court of chancery of England."

MARSHALL, C.J., in *Vattier* v. *Hinde*, 7 Pet. 251, 274 (1833).

These principles, rules, and usages of the English Court of Chancery are now expressly adopted by one of the rules of the Supreme Court of the United States in equity.

Equity Rule 90.

II.

The English equity practice, and the practice adopted in the better-considered equity decisions in this country, is adverse to dismissing a bill upon motion for preliminary injunction.

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In *Brooke* v. *Clarke*, 1 Swanst. 550 (1818), complainant prayed for an injunction and account for the infringement of a copyright. Lord Chancellor ELDON doubted complainant's title, and directed a case for the opinion of the Court of King's Bench. That court having certified that complainant had no title, defendant moved that the bill be dismissed. Lord Chancellor ELDON, in overruling the motion, said, —

> "We have therefore advanced thus far that the plaintiff cannot succeed in the motion for an injunction . . . but I feel that this bill cannot be dismissed without more delay. . . . The case may still be brought to a hearing. The person who then presides here may entertain a different opinion on the question of title."

In *Blow* v. *Taylor*, 4 Hen. & Mun. 159 (Va. 1809), appellant obtained an injunction to stay proceedings on a judgment at law. The chancellor, being of opinion that the entire controversy was concluded by the action at law, dissolved the injunction and dismissed the bill. On appeal to the Supreme Court of Appeals, it appeared that —

> "The whole Court were clearly of opinion that the complainant had a right to continue his cause as an original suit after the dissolution of the injunction and directed a decree to be entered.
>
> "'That there was no error in so much of the decree as dissolved the injunction but that the Court erred in dismissing the bill which should have been retained for further proceedings with leave to the parties to take depositions,' etc."

To the same effect are —

Cole v. *Sands*, 1 Tenn. 83 (1805).
Porter v. *Moffett*, 1 Morr. (Iowa), 108.

Brown v. *Wilson*, 56 Ga. 534.
Strong v. *Harrison*, 62 Miss. 61.

See also —

Charles River Bridge v. *Warren Bridge*, 6 Pick. 376, 393.
Basche v. *Pringle*, 21 Oregon, 24.
Lynn v. *Iron Co.*, 34 Md. 603–638.
Cheney v. *Jones*, 14 Fla. 587–620.

III.

Upon appeals from interlocutory decrees, it is now uniformly held that the Circuit Court of Appeals has the right in its discretion finally to dismiss complainant's bill. But in exercising this right the court carefully distinguishes appeals from interlocutory decrees, where the parties have completed their evidence upon the issues of the case and taken full proofs, and a full record is therefore before the court, and appeals from orders granting preliminary injunctions, where only ex-parte affidavits are filed. In the following cases, where the Court of Appeals has dismissed complainant's bill upon an appeal from an interlocutory decree, it is strongly intimated that the ex-parte affidavits and imperfect record in the case of an appeal from a preliminary injunction would, in accordance with the rule of practice in the above cases, preclude the Court of Appeals from dismissing the bill or finally disposing of the suit.

In *Richmond* v. *Atwood*, 52 Fed. Rep. 10 (C.C.A. for First Circuit, 1892), the leading decision upon the right to dispose finally of a suit upon an appeal from an interlocutory decree, this discrimination is very clearly made (p. 23):

"Unquestionably the circuit court upon the hearing therein might have found the facts against the complain-

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ant and dismissed the bill, and the question presented is whether this court, having an appeal before it involving the same record and the same facts, may, if error is found upon the general question of right, proceed to do what the court below should have done; or shall this court, although it has examined the record, and determined the right under the patent the other way, simply dissolve the injunction, permit the accounting to go on, and, after the useless expense and annoyance incident to such an investigation, upon re-examination of the same record, by the same court, put in execution the right which it had necessarily determined in the appeal theretofore considered? In our view, the accounting could in no way aid the final execution of the right already ascertained by this court, and under such circumstances would be worse than idle; and a rule which would permit such circuity and circumlocution is unnecessary, and would not be useful to either the parties or the court. Now, this case must be distinguished from the class of cases where the injunction is preliminary, and granted upon the bill, or where there is only a partial hearing upon the merits, or where the record is incomplete, or evidence is excluded which should have been considered. We are not called upon to decide as to the scope of the mandate under such circumstances, but it is probable that no one would contend that, as an invariable rule, it should go to a final disposition of the cause upon its merits. *Deas* v. *Thorne*, 3 Johns. 543; *Huntington* v. *Nicoll*, Id. 566.

"It is quite probable, indeed quite clear, that a distinction would be made between injunctions granted preliminarily as a matter of discretion, and a decree for an injunction granted upon the final determination of a particular right; and the general rule that an appellate

court interferes reluctantly with injunctions granted *in limine* as a matter of discretion should not, in our view, apply to an appeal under the statute from an interlocutory decree for a perpetual injunction based upon a final determination of the substantial property right in a patent cause. In the case under consideration, the hearing in the Circuit Court upon the merits as to the validity and the infringement of the patent, was full and complete, and the general property right was determined, so far as it could be done by that court; and the perpetual injunction, the order to account, and the appointment of the special master were based upon such determination of the property right. The record before us is complete. Everything is here for our consideration which was before the court below. We must go to the full merits, as shown by the record, in order to determine whether the interlocutory decree for a perpetual injunction is founded in error, and if we determine the property right adversely to the complainant, the injunction should be dissolved; and no sufficient reason has been suggested why the accounting — to which the complainant is not entitled, and which would be an invasion of a right, and therefore inequitable and improper, under our view of the case — should proceed."

In short, the ground of the decision is that, as the decree of the circuit courts was made upon the full merits, and necessarily adjudicated the property rights involved, the appellate court, having the whole merits before it, may deal with the entire decree, and not merely with that part of it which relates to the injunction. Such a case is entirely distinguishable, as the court points out, from a preliminary

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order granting an injunction, in which (first) the full merits are not before the court, and (second) the entire order appealed from is a grant of injunction in the discretion of the court to preserve matters *in statu quo* until the property rights can be determined upon full proofs. The court says (p. 26), —

> "Indeed, it seems to have been the practice from an early period, in the House of Lords, to direct a final disposition of causes before it with a full record, upon appeal from interlocutory orders and decrees based upon a hearing upon the merits below, whenever it was found that there was no equity in the complainant's case.

In *Marden* v. *Campbell Printing Press Co.*, 67 Fed. Rep. 809 (C.C.A. for First Circuit, 1895), upon an appeal from an interlocutory decree, the importance of the fact that the appeal brings up the whole record after a full hearing is clearly pointed out (p. 814):

> "Assuming this to be correct, and assuming that a decree for an injunction like that in the pending cause is within the purview of the seventh section referred to, it follows that the whole record touching the merits of the decree, so far as it supports the injunction, comes up before the court of appeals, or can come there, so that the court has before it everything in this respect which the circuit court had, or which the court of appeals would have on an appeal from a final decree. So it is apparently an absurd proposition that, under such circumstances, the court of appeals should shut its eyes and dispose of the question as perhaps it might dispose of an appeal from a mere *ad interim* injunction. Pass-

ing by this absurdity, there would follow another apparent absurdity in the proposition that, on such appeal, this court should pass on the merits and order the injunction dissolved, because on the merits it found the patent in question invalid or not infringed, and that yet the court below should proceed in the vain and fruitless pursuit of so much of the sequence of the litigation as comes from that part of the same decree which orders an accounting. Such would be the result if, on an appeal like this at bar, this court had no jurisdiction except over the injunction itself. At this point, the settled practice of the English chancery came to our assistance, as appears by the determination in *Richmond* v. *Atwood*, 2 C.C.A. 596; 52 Fed. 10, already referred to. It is apparent, however, from the closing sentences in *Richmond* v. *Atwood*, that the rule is one of equitable convenience, to be applied when the full record is brought before us on account of an appeal against an injunction granted by an interlocutory decree after a full hearing. There is no indication in *Richmond* v. *Atwood* of any disposition to go further than this, or to permit other parts of a decree to be brought up by cross appeals, or appeals of the complainant below, for the purpose of being heard as on an appeal from a final decree. Under the circumstances of *Richmond* v. *Atwood* the injunction covers the entire case, and thus an appeal from the injunction brings up the whole decree, and necessarily the whole record, so that the court is required, for the mere purpose of adjudicating touching the injunction, to examine on appeal the entire cause; and so no detriment to the court or the parties can come by its thereupon disposing of the merits, and entering orders to the circuit court

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analogous to those entered upon an appeal from a final decree. This, however, is a very different thing from reaching out for parts of the record, and of the decree below, not covered by the injunction order."

In *Bissell Carpet Co.* v. *Goshen Co.*, 72 Fed. Rep. 545 (C.C.A. for Sixth Circuit, 1896), the court pointed out (p. 551), that in the case at bar "the injunction decree appealed from was not a mere preliminary injunction granted in the exercise of the discretion of the Circuit Court. The case had been fully prepared by both parties. It came on regularly to be heard on the merits, and was so heard. The court was obliged to decide and did decide first that the complainant's patent was valid;" second, that it was infringed; and then added:

"when this case came on to be heard here, this court was obliged to examine the entire record and determine the merits of the cause just as the Circuit Court had done."

The court points out (p. 555) that in such a case "the appeal necessarily brings up the full record;" and in referring to the old English practice, the court says (p. 556), —

"It was the unquestioned practice of the House of Lords to make and direct a final disposition of the cause when it had before it a full record and the appeal was from an interlocutory decree granted upon a hearing upon the merits. . . . If it was so possessed of the whole record as to enable it to see and adjudge that the complainant had no equity in his suit, the court would not only direct a reversal of the decree appealed from, but terminate the litigation by a direction that the bill should be dismissed."

The court discriminated between an appeal from an interlocutory decree and an appeal from a preliminary injunction order, using the following language in respect to the latter (p. 549:) —

> "Where a preliminary injunction is allowed upon a *prima facie* showing, and without the determination of the merits, this court will ordinarily, on an appeal, consider only the question as to whether, on the *prima facie* case made, there has been an abuse of discretion. Such preliminary injunctions are ordinarily intended only to operate *pendente lite*, or until a hearing on the merits can be had. They are granted upon a mere summary showing upon affidavits. Their issuance is not a matter of right, and rests in the sound discretion of the judge."

The above case was cited and approved by the Supreme Court, 165 U.S. 523.

IV.

It has been decided in some cases that, upon a motion for preliminary injunction, if there is nothing to be decided but a question of law, the court will decide that question, and so finally dispose of the suit.

In *Mayor of Knoxville* v. *Africa*, 77 Fed. Rep. 501 (C. C.A. for Sixth Circuit, 1896), defendant appealed from the order for preliminary injunction, and the Court of Appeals directed the bill to be dismissed. The injunction had been granted to a complainant who sought to enjoin the city from removing tracks from certain parts, in which complainant claimed to have a franchise under a certain ordinance. The Court of Appeals held that the appeal presented questions of

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importance which "arise upon the face of the ordinance of 1876."

The court decided the case (p. 506) —

> "upon the ground that the ordinance of 1876 was not a valid or effectual consent"

to the occupation of any other than certain specified streets.

The court limited this decision to cases of appeals —

> "where the legal questions are presented by the record in such a manner as that justice can be done the litigants and fruitless delay and a second appeal avoided."

In this very case, however, the court mistook the facts of the case, and on rehearing said, —

> "The former direction to dismiss complainant's bill must be retracted" (p. 512).

The court explained its former decision by saying (p. 511), —

> "So far as the propriety of that injunction depended upon the validity of the ordinance of January 11, 1876, we were in possession of a complete record and could do full and final justice by determining the matters of law upon which the street rights claimed under that grant depended."

But it appeared that one of the streets in controversy was claimed under the valid part of the ordinance, and therefore certain questions of fact arose; and the court said, —

> "Whether or not that grant has been lost depends upon a great variety of facts which can only fully ap-

pear after proof has been taken. . . . The record is not in such a condition as to justify a final disposal of the questions of fact upon which the ultimate rights of the parties must depend. . . . All such questions are reserved until final hearing."

In *Thomson-Houston Electric Co.* v. *Brass Co.*, 80 Fed. Rep. 712 (C.C.A. for Sixth Circuit, 1897), it was said, on appeal from a preliminary injunction (p. 730), —

> "It is well settled that on appeals like this this court will ordinarily look into the case merely to see whether the discretion of the court below in issuing or withholding the order of preliminary injunction has been abused; and that only in exceptional cases in which a controlling question of law may be as fully and fairly considered as upon final hearing, and the court has no doubt upon it, will it finally dispose of the injunction and the case on a hearing like this."

So in *Green* v. *Mills*, 69 Fed. Rep. 852 (C.C.A. for Fourth Circuit, 1895), the bill attacked the franchise law of South Carolina as unconstitutional, and asked for an injunction against the supervisor of registration, which was granted. The case was argued upon the bill and return, and not upon affidavits, and the Court of Appeals held (p. 859) that the case was not one of equitable cognizance at all, because it sought "to restrain the exercise of governmental powers," and therefore directed (p. 860) the bill to be dismissed, "as we entertain no doubt that such a bill cannot be maintained."

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V.

However clear the facts may seem to be, nevertheless, if there is a question of fact involved, the court will not dismiss the bill, or finally dispose of the suit, upon an appeal from a preliminary injunction.

In *Curtis* v. *Overman Wheel Co.*, 58 Fed. Rep. 784, there was an appeal from a preliminary injunction in a patent suit. On looking into the prior art, as set forth in defendant's affidavits, the court was of the opinion that the improvement of complainant's patent "did not arise to the dignity of invention;" and the court stated that "the vital question" was presented so clearly that it felt at liberty to re-examine a previous adjudication in another circuit sustaining the patent; yet the court did not order the bill dismissed even in this case. The opinion concludes:

> "The order of the Circuit Court is reversed with costs."

See also *Andrews* v. *Type Works*, 61 Fed. Rep. 782 (1894), where it is laid down (p. 790) that all that can be conclusively determined on an appeal from a preliminary injunction is that the order for the injunction was a proper or improper one when made. Mr. Justice HARLAN sat in this case.

See also —

Mayor of Knoxville v. *Africa*, *supra*.

VI.

The only decisions in the federal courts contra to the above rule that a bill will not be dismissed upon appeal from a preliminary injunction where there is any question of fact

involved, but that complainant will be allowed to proceed to final hearing and introduce what proof he can in support of the allegations of his bill, are to be found in the Seventh Circuit.

In *Stover Mfg. Co.* v. *Mast, Foos & Co.*, 89 Fed. Rep. 333 (C.C.A. for Seventh Circuit, 1898), defendant appealed from an order for a preliminary injunction. The Court of Appeals not only reversed the order, but directed that the bill should be dismissed (p. 340), because "it is not perceived that further proofs are possible of a character to change the result."

In the first place, the court relies on *Smith* v. *Vulcan Iron Works*, 165 U.S. 518, which dealt with an appeal from an interlocutory decree, final in all respects save a specified award of damages. What the Supreme Court said in this case of *Smith* v. *Iron Works* with reference to the disposal of a suit where the testimony had been completed, and where there was a complete record before the court, cannot be invoked in a case where the court is dealing with an appeal from an order for a preliminary injunction. Nothing that was said in *Smith* v. *Iron Works* would justify this application of the language there used.

In the second place, the Court of Appeals, in *Stover* v. *Mast*, referring to the difference between appeals from interlocutory decrees and appeals from preliminary injunctions, continued (p. 337), —

> "If there is ground for a distinction in that respect, it is in favor of the appeal from a preliminary order made upon *ex parte* and imperfect showings at the commencement of litigation rather than an appeal from an injunction perpetual in terms, granted after a full hearing, which is called interlocutory only because there re-

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mains to be taken an accounting upon which the evidence adduced cannot ordinarily affect the injunction."

This reasoning should have led the court to proper conclusion that in the suit before it it could only go to the extent of reversing the order for a preliminary injunction; but the court, as indicated above, comes, curiously enough, to the erroneous opinion that it could dismiss the bill.

In the later case of *Antisdel* v. *Cabinet Co.*, 89 Fed. Rep. 308 (1898), decided by the Court of Appeals for the same circuit, an order for preliminary injunction was reversed on appeal, with directions to dismiss the bill. Upon petition for rehearing, however (90 Fed. Rep. 828), it was ordered that in lieu of the words "dismiss the bill," there be inserted in both the opinion and the decree the words "proceed in accordance with the opinion of this Court."

This last case would indicate that the Court of Appeals for the Seventh Circuit had swung into line in support of the general rule stated above. It appears, however, from the decision in the late case of *Magic Light Co.* v. *Gas Lamp Co.*, 97 Fed. Rep. 87 (C.C.A. for Seventh Circuit, 1899), that this court has followed its decision in the Stover case, *supra*. In *Magic Light Co.* v. *Lamp Co.* the court reversed, on appeal, a preliminary injunction granted below, and directed the Circuit Court to dismiss the bill on the ground that the views expressed in the opinion seem "to exclude the possibility of evidence to sustain the charge of infringement." Among the statements in the opinion, we find the following (p. 90): —

> "There is in the record no evidence of mechanical equivalency between the two [constructions]."

"It is yet unproved that both forms of construction operate in the same or similar way."

Certainly these statements refer to issues of fact which complainant should properly have had an opportunity to establish by further proof introduced on his own behalf and by cross-examination of the defendant's witnesses.

Henry E. Everding
Arthur v. Briesen
Fred'k P. Fish.

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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, trading under the firm name and style of CASTNER & CURRAN,

Petitioners,

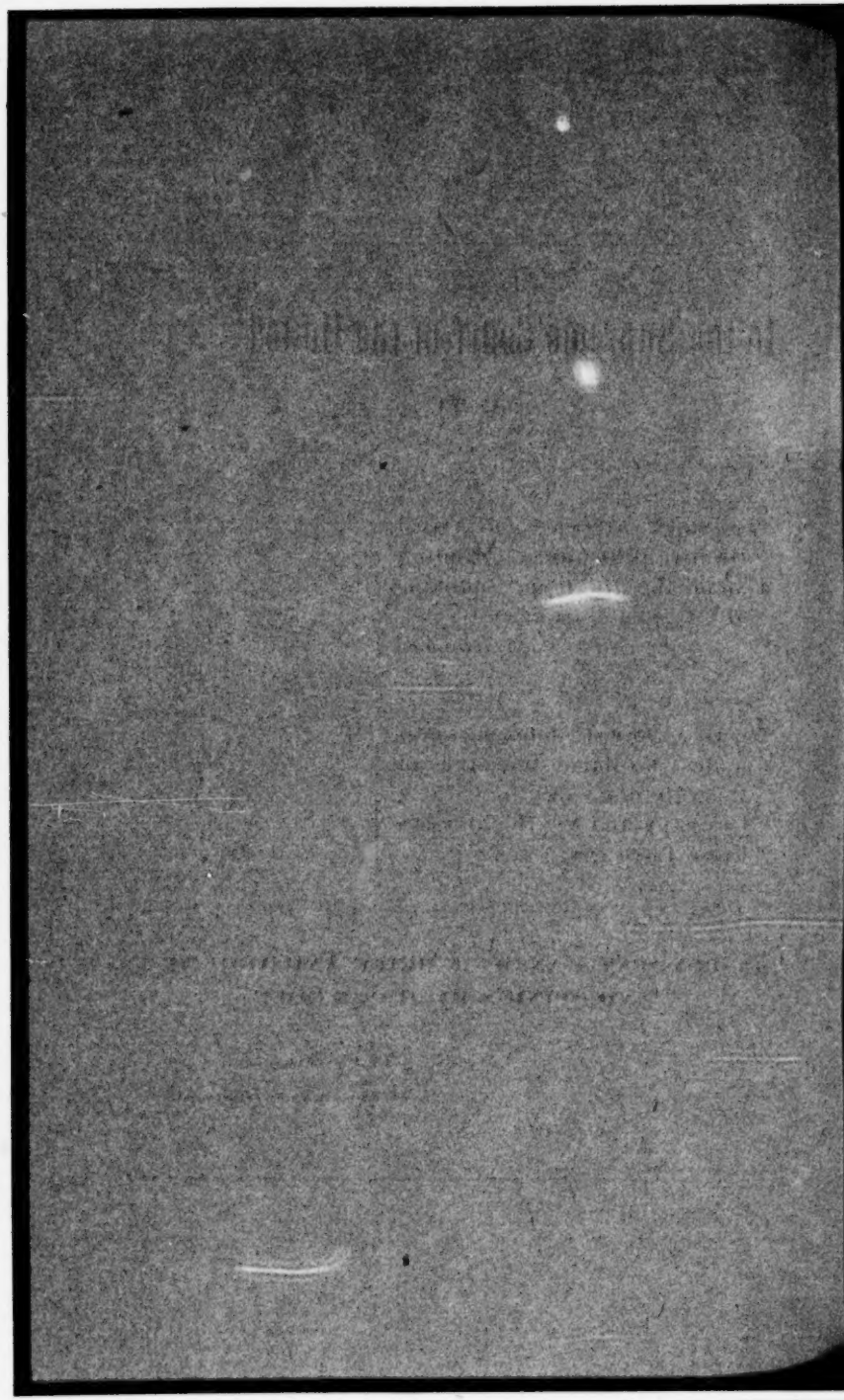
vs.

W. H. COFFMAN, doing business under the name and style of POCAHONTAS COKE AND COAL COMPANY and W. H. COFFMAN COKE COMPANY.

No. 370.

RESPONDENT'S ANSWER, BRIEF AND ARGUMENT AND OPINION BY JUDGE GOFF.

A. G. SAFFORD,
Attorney for Respondent.



In the Supreme Court of the United States.

OCTOBER TERM, 1898.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, trading under the firm name and style of CASTNER & CURRAN, *Petitioners,* *vs.* W. H. COFFMAN, doing business under the name and style of POCAHONTAS COKE AND COAL COMPANY and W. H. COFFMAN COKE COMPANY.	No. 370.

RESPONDENT'S ANSWER.

And now comes W. H. Coffman, the above-named respondent, and for answer to the petition for a writ of certiorari, or unto so much thereof as he is advised is material for him to make answer unto, answering, says:

I. That he admits the truth of the first paragraph of the petition.

II. That he denies the allegation in the second paragraph, and while it is true that it was stated in the original bill filed in the United States Circuit Court for the Fourth Circuit, that the supposed damage "is largely in excess of the sum of $10,000," it appears from the whole record that no evidence

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was introduced whatever touching this subject, excepting a pretended assignment from the Southwest Virginia Improvement Company, under date of April 1, 1895, which purported to convey to the petitioners the entire and exclusive right to use the word "Pocahontas" as a trade-name or mark for coal, for the consideration of $5.00, only.

III. As to the third paragraph, the respondent admits that the suit was brought to restrain him from using the word "Pocahontas," as applied to coal, but the respondent denies that the petitioners had a trade-mark in that name, as will at large and more fully appear hereafter.

IV. As to the allegations in the fourth paragraph, this respondent denies that the petitioners ever had title to the word "Pocahontas" as a trade-mark; and, while it does appear that a pretended assignment was made by the Southwest Virginia Improvement Company to the petitioners, pretending to give to them the right to use that name, under date of April 1, 1895, as set forth above, the petitioners could not derive title from the Southwest Virginia Improvement Company because, as appears hereafter, that Company had no right to appropriate "Pocahontas," a geographical name, as a commercial trade-mark; and the case shows no pretense on the part of that Company to claim that name until April 1, 1895, and there is no evidence whatever that the Southwest Company had applied that name to the product of its mines prior to that date, and, from the very inception of its business, had permitted the petitioners to sell by that designation, not only the product of its mine but that of other coal mines in the Pocahontas field, and even if the Southwest Virginia Improvement Company had, originally, any right to the name, they had abandoned the same by permitting, for a long series of years, all the other operators in the field to apply it to their products in the markets, and the record shows that the petitioners, under one business designation or another, had largely controlled the output of the mines, not only of the Southwest Virginia Improvement Company, but also of twenty-five or thirty other mines in the field, there having been a successful combination by the Norfolk & Western R. R. Co.

and the petitioners, by which they were enabled to handle the entire output of that region from July, 1883, until about November 1, 1896, when the respondent became the agent and factor for the Indian Ridge Mines; therefore, the respondent says that whatever right the Southwest Virginia Improvement Company may have had to that name had been abandoned by long-continued acquiescence in the use of that name as designating other property than its own.

V. In answer to the fifth paragraph the respondent says that it is true that in 1881 that portion of Tazewell County, Virginia, in which the town of Pocahontas is situated had no distinct geographical name, but it was not an unexplored wilderness, as appears from the affidavit of Captain Welch, who explored that region of the county, and found and examined the immense coal deposits, and who made at that time a report thereon to the parties employing him; and that June 30, 1882, the United States Government established a post office there and gave it the name of "Pocahontas," a name which had theretofore been given to the settlement by the proprietors of the land in that vicinity; for proof of the incorrect statement in this paragraph, that the South West Company adopted the name, or symbol, of "Pocahontas" as a trade-mark during the year 1882, reference is made by the petitioner to the affidavit of Samuel Castner, Jr., upon page 15; it is to be borne in mind that this affidavit of Castner was filed in the cause at the same time with the bill of complaint for the purpose of obtaining a preliminary injunction, and can in no sense be considered as evidence. Castner, as appears from other parts of the record, had only hearsay evidence of what took place prior to 1883; besides, he is impeached by his subsequent testimony, and the sworn statement made by him in his application to register the word "Pocahontas" as a trade-mark in August, 1885; as pointed out by Judge Goff in his opinion, the name "Pocahontas" was given to the post office established by the Government a year prior to the shipment of any coal to the markets from that field, the first shipment having been made in July, 1883 (78, 159, 160, page 1, Industrial Edition of Bluefield *Daily*

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Telegraph), the post office having been established in June, 1882. The town of "Pocahontas" was incorporated by a special act of the legislature January 31, 1884, two years and more after the establishment of the post office by that name. At the very beginning of the opening of the field and the shipment of coal to the public market, Castner & Co., Limited, a corporation organized under the laws of the State of Pennsylvania, and the predecessor of the petitioners, were the agents of the Southwest Company, and that corporation applied for registration of the word "Pocahontas" as a trademark August 25, 1885, which was claimed to have been used continually by said corporation since January 1, 1885; and the case shows that not only had the Government post office been established and town of "Pocahontas" chartered by the State of Virginia, but also that the product was not shipped to and did not become known in the markets as "Pocahontas" coal until July, 1883, and after, a year after, the post office had been established at that point. The statement that as early as 1882 the Southwest Company had adopted the name of "Pocahontas" as a trade-mark is entirely without foundation, as it appears never to have been claimed by them prior to April 1, 1895, and that Castner & Co., Limited, claimed that they used it continually after January first, 1885, as applied not only to the coal of the Southwest Company, but also to all, without exception, of the working mines in that field from January 1, 1885, to the first of November, 1896. The statement by the interested witness, Kimball, that coal was not known to exist in any quantity prior to the opening of the mines by the Southwest Company, is distinctly disapproved by the testimony of Captain Welch (159). The testimony shows, as a whole, that the Southwest Company never applied the word "Pocahontas" as a designation for coal until long after that word was used as descriptive of that particular locality and was the name of the post office; that the name was given to this deposit because it was first opened in the settlement which was known as "Pocahontas;" in fact it appears, beyond a peradventure, that the geographical locality gave the name to the coal and not, as the petitioners con-

tend, that their trade-mark gave the name to the locality. This appears as well from the references to the record above cited and from the geological atlas of the United States ("Pocahontas folio, Virginia-West Virginia, prepared by the United States Geological Survey, Department of the Interior, under the direction of Charles G. Walcott"), herewith submitted. The coal deposit of this entire region is of a remarkably uniform character. See report of analysis of all the mines (122, 123, 124, 151, 152, 153).

VI. In answer to the sixth paragraph, the respondent denies that the record shows that the Southwest Company adopted the word "Pocahontas" as a trade-mark, nor is it true that Castner & Co., Limited, predecessors of the petitioners, applied the name of "Pocahontas" only to inspected and selected coal; the facts in regard to this matter of selection and inspection of the coal with relation to the name "Pocahontas" are, as stated by Judge Goff in his opinion, that the word has acquired a generic meaning, and it is clear that in the business world it is used to indicate the place where the coal is produced, and it does not point to either the producer or the vender of the same. And the petitioners did not commence to inspect their coal prior to 1894 (132–158–161), and petitioners and their predecessor, Castner & Co., Limited, were not the sole agents for the sale of the coal produced by the Southwest Virginia Improvement Company. By reference to the Coal Producers' Contract (19–26), it will be seen that the Southwest Virginia Improvement Company, and other operators, consigned all of their product to a general coal agent appointed by the Norfolk & Western R. R., and that Castner & Co., Limited, were simply appointed as general tidewater agents, and only handled so much of the product as went to tidewater for shipment; the remainder of the product, that part of it otherwise sold, was sold directly to the consumers by the general coal agents as Pocahontas coal, and did not pass through the hands of the petitioners or their corporate predecessors (132). The object of said "Coal Producers' Contract" was to effect a close combination of all the producers of coal whose output and prices should be placed

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under the exclusive domination of the railroad company, and the petitioners were mere agents for the disposition in the market of the coal which was well known, both that which the petitioners handled and that which they did not handle, as "Pocahontas" coal.

VII. As to the seventh paragraph of the petition, the respondent denies that it (the coal) is known as "Pocahontas" coal by the reason of any inspection given to it by the petitioners; the name is traceable distinctly to the geographical locality in which the deposit is found, and does not mean in the market that it has been inspected or otherwise beneficially manipulated; it appears that all of the coal shipped out of that region is inspected, the petitioners' inspection commenced in 1894, doing this while the coal is being loaded from the tipple into the car, when the impurities which are not thrown out by the miner while blowing down the coal, are removed; the name "Pocahontas" had been applied to the product of this coal field for twelve years before the petitioners commenced the inspection of coal, to which they now claim the word applies. This is evidently an afterthought, as will be seen from an inspection of the bill of complaint, their right being based, as is stated in the second paragraph, upon the claimed fact that in 1882 the Southwest Virginia Improvement Company began selling the coal from their mine as "Pocahontas" coal, and because that company then adopted the trade-mark "Pocahontas" as designating its output. At the beginning, and up to 1894, the output was shipped by petitioners as "Pocahontas" coal without having been inspected, as now claimed, so that the name, as a trade-mark, more properly applies to uninspected than to inspected coal.

And by way of further answer to the fourth, fifth and sixth paragraphs of the petition and in conformation of the allegation of the respondent, attention is called to the opinion of Judge Goff, as follows:

> "It is clear from the evidence that Pocahontas is a word of well known geographical signification, denoting that large and valuable section of the Virginias, famed

the world over for the remarkably valuable and useful coal and coke that it produces. Prior to 1882 this region was comparatively unknown, and entirely in the primeval state in which nature had left it, constituting a part of the Great Flat Top Mountain portion of southwest Virginia and southeast West Virginia. In the years immediately preceding 1882 this wilderness had been sought out and explored by those who represented the capital and energy by which it was afterwards developed. The experts sent into its theretofore hidden recesses returned with the report of its fabulous wealth and wonderful possibilities. The result was the extension of the Norfolk & Western Railroad into and through the Great Flat Top region, and the organization of the Southwest Virginia Improvement Company, under whose auspices the mines were opened and coal was first shipped. The development inaugurated by this company was commenced during the fall of 1881, continued in the year 1882, and the railroad was completed to the mines in the springtime of the year 1883. **The town located at the point where the first mine was opened was early in the year 1882 named Pocahontas, and the post office which was established by the Department at Washington on the 30th day of June, 1882, was likewise then called by the same name. The first coal shipped to the tidewater markets left the mines in July, 1883, and it was billed and sold as 'Pocahontas Coal.'**

"The entire field is now known as the 'Pocahontas' and the 'Pocahontas Flat Top Coal Field.' It embraces large portions of Tazewell and Wise counties in the State of Virginia, and of Mercer, McDowell, Wyoming and Raleigh counties in the State of West Virginia. It is divided into three sections, or working divisions: the Pocahontas, which includes all the mines around the town of Pocahontas; the Bluestone District, embracing the improvments on the Bluestone River; and the Elkhorn, the country in McDowell County on the Flat Top Mountain. **The coal shipped from all this section is known in the markets of the world as 'Pocahontas coal,' evidently so called from the town of that name in which the first mine was located, and from which the first shipments were made.** The coal beds are above the water level and range from five to thirteen feet in thick-

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ness, extending through an area of about five hundred square miles, or three hundred and twenty thousand square acres. An actual survey of the outcrop of this field discloses that about one-third of the territory is barren, and that there are near two hundred and thirteen thousand square acres underlaid with the Pocahontas vein of coal. A moderate estimate gives to each square acre 10,000 tons of marketable coal, or say two billion one hundred and thirty million tons. At the time when this suit was instituted, thirty-eight different coal and coke companies were operating in the field, all of them advertising, mining and selling the coal excavated from the Pocahontas vein, and known as the 'Pocahontas Flat Top Coal.' For the manufacture of coke over five thousand ovens had been constructed and were in use. During the year 1883 ninety-nine thousand eight hundred and seventy-one tons were mined, the output in the following years rapidly increasing until, in 1894, three million eight hundred and eighty-eight thousand and fifty-eight tons were sent to market.

"*There is no evidence to sustain the allegation in the bill that the Southwest Virginia Improvement Company began selling coal in the year 1882 from the Pocahontas mine, nor that it made any sales of 'Pocahontas coal' in the year 1883, in the sense that those words are used in as a trade-symbol. Nor is there any satisfactory evidence tending to show that said company adopted and used a trade-mark, or made any effort to establish one, as such, prior to the year 1885. It is true that in the assignment made by the Southwest Virginia Improvement Company to the complainants, it is recited that said company 'did adopt on or about the first day of July, 1882, as a trade-mark the word-symbol "Pocahontas,"' but surely that statement in such a paper, made under the date of April 1, 1895, cannot be considered as proving that fact, and the record has been searched in vain for the testimony establishing it.*

"*The first coal sent to market, according to the evidence, was in July, 1883, at which date both the town of Pocahontas and the post office of the same name had been in existence for a year at least.* The claim of complainants, that the town had no existence until January 31, 1884, the date of the act of the Virginia Legislature incorporating it, and that, therefore, it was not known legally, in a geographical sense, prior to such date, is not, in the light of the testimony and in connection with the important questions herein involved, entitled to the consideration given it by

counsel. *There can be no doubt but that at the time the first shipment of coal was made by the Southwest Virginia Improvement Company the town of Pocahontas was in existence, the post office had been established, and that the coal itself was sent from the station of that name. The word 'Pocahontas' then denoted the locality at which the article in which the company was dealing was mined, as well as the point from which it was shipped, and it also indicated in business matters, the natural product of all that region.* It follows, therefore, that it could not then be used as an exclusive trade-mark, and as a matter of fact it was not so employed until some time thereafter. *We are impelled to find from the testimony that in the early shipments of coal the word Pocahontas was used, not as a word symbol or trade mark, but simply as the name of the town from whence it came, for the purpose only of pointing out the place of production.* The coal had not then been used and it had not produced the wonderful results that it subsequently did; its reputation had not been made and it had not at that time found its way to the marts of the world, to the furnaces of land and sea. The operators of that section and their vendees, including complainants' predecessors, had not then been given the opportunity to inspect, grade and purify it so as to make it typify the high degree of excellence that it now enjoys, and there is no evidence tending to show that selection and inspection were then resorted to other than is usual in all mines. The first direct evidence bearing on the trade-mark is the application of August 25, 1885, made by Castner & Company (Limited), to register the word 'Pocahontas' at the United States Patent Office. Such *registered trade-mark is not now relied upon by complainants, why we have not been advised, but likely for reasons connected with the decision of the Supreme Court in the Trade-Mark Cases*, 100 U. S., 82. It is, however, worthy of notice that such application was made under the provisions of Sec. 4937, Rev. Stat. of the United States, which require the party so applying to set forth in the statement made by him the length of time, if any, during which the trade-mark had been in use, and that said applicants in their statement so filed used this language: 'This trade-mark has been used continuously by said corporation since about January 1, 1885.' The word-symbol, or device now claimed by complainants, as a trade-mark, is founded on the rule of the common law, that the person or company first employing it to distinguish the goods made or sold by the owner thereof, is entitled to

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the benefits arising from its exclusive use. The chancery courts of England and of this country have long recognized this privilege, and have enforced it, if the property right of the claimant thereto has been duly established.

"As we see this case, the complainants are not entitled to the *exclusive* right to use the word 'Pocahontas,' as descriptive of either the locality or character of the coal mined in the 'Pocahontas coal field,' but all of the producers of that product in that section have the right to so use it in common with complainants. *That word has acquired a generic meaning, and from the evidence before us it is clear that, in the business world, it is used to indicate the place where the coal is produced, and that it does not point to either the producer or the vendor of the same.* All the mine owners who by their labor succeeded in establishing their industries in that section, have the right to use in their business the geographical word which is the recognized designation of the same, and that points to the product peculiarly indicative of its wealth; and surely it cannot be that any one of them can inhibit all the rest from exercising the privilege, which was the birth-right of the section, and is an advantage common to all who are interested in it. *To give to complainants below the exclusive right they claim in their bill would be to ignore the principle that is the foundation of the protection given to trade-symbols and marks.*"

VIII. As to the eighth paragraph, the respondent asserts that the regulation of the petitioners of 1894, in regard to inspection and grading of their coal, has not increased the volume of sales, and has no knowledge as to the expenditures claimed to have been made by them in the development of their business.

IX. As to the ninth paragraph, the respondent denies that the public and dealers in coal have uniformly acquiesced in the pretended right of the petitioners and their corporate predecessor to the exclusive use of the word "Pocahontas" (95, 103, 104, 105, 142, 144, 164, 170, 171). The corporation known as the "Pocahontas Company" (145) was chartered by the State of West Virginia, March 8, 1895, for the purpose of mining coal, manufacturing coke, buying, selling and generally dealing in coal and coke, and it is shown (p. 17,

Daily Telegraph) that this "Pocahontas Company" in 1896, handled the coal output of thirty-two operations, and the coke output of twenty-seven operations, which was about seventy per cent of the total product of the Pocahontas field; the other thirty per cent being also disposed of in the market as "Pocahontas" coal; and prior to that time the operators in the field disposed of all their coal through the general coal agent, who consigned as much as went to tidewater to the petitioners, and such of it as was not consigned to the petitioners was disposed of directly to the trade by the general coal agent (27–30) as Pocahontas coal. The Pocahontas Coal Company (the Norfolk & Western Railway Company in disguise) from its organization, and not earlier than 1884, until the advent of the respondent as an agent and factor for the Indian Ridge and Browning mines, handled substantially all the coal produced; it is therefore apparent there were others besides the petitioners or their corporate predecessor, who sold in the market the product of this field as "Pocahontas" coal, coal with which the petitioners had nothing whatever to do. The combination between the Railroad Company and petitioners has been such as to make it almost impossible for new and independent operations to exist; no new operation being permitted until the owner signed the scandalous "Coal Producers' Contract" binding himself to dispose of all of the output through the general coal agent by the Railroad Company.

X. As to the tenth paragraph.

(*a*) The respondent denies that he offered for sale inferior coal at reduced prices under the name of "Pocahontas" coal, and avers that the coal offered for sale by him was of the same, or superior, quality as that sold by petitioners, and that he has obtained the highest market price for the same. That prior to the first day of November, 1896, the petitioners handled the output of the Indian Ridge mines directly, and disposed of all of the output of these mines under the name of "Pocahontas" coal. During the time that the respondent has handled the output of this mine it has been subject to the same class of inspection, and has been marketed by the respondent

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as "Pocahontas" coal, except during the time the respondent was improperly enjoined from using the name "Pocahontas." That before the respondent marketed the output of the Browning mine the petitioners had marketed that output as "Pocahontas" coal, and the petitioners have since succeeded in getting away from the respondent the business of marketing the output of the Browning mine, and have made many unsuccessful efforts to regain for themselves the agency for the Indian Ridge mine.

(*b*) The respondent alleges that he has not practiced any deception upon the public or perpetrated any fraud upon the petitioners, or has advertised to sell the coal obtained from the Browning and Indian Ridge mines, and the Pocahontas Flat Top region, as having been purchased from the petitioners, or as mined by them. He has represented it as coal from the Pocahontas field, and it was in fact such coal; he has made no false representation, and has invaded no right to which the petitioners can properly assert a claim. As stated in the opinion of Judge Goff, the allegation that the respondent has been engaged in unfair or fraudulent trade is not supported by the evidence, and the representations made by him were neither fraudulent nor untrue; it nowhere appears that he ever represented to the public that he was selling the same article sold by the petitioners, except as their coal was comprehended by the word "Pocahontas," which also justly describes his own.

(*c*) The respondent denies that he ever sold any coal as "Pocahontas" coal without its being first prepared, selected and graded and properly inspected.

(*d*) Respondent denies that he ever deceived, or attempted to deceive, any persons of the trade, or gave any one any cause to believe that he was selling the petitioners' coal, and even if the respondent had done so, that question is entirely independent of the question of trade-mark, and of the petitioners' right to the exclusive use of the word "Pocahontas."

The finding of the Circuit Court of Appeals is explicit upon this point, and is as follows:

"This allegation that the **defendant has been engaged in unfair and fraudulent trade is not supported by the evidence.** It has been shown that he was advertising and selling 'Pocahontas coal,' but the testimony also shows that the coal he so advertised and sold was in fact from the 'Pocahontas coal field.' It follows that the representations made by him were neither fraudulent nor untrue, and that he had a lawful right to so advertise and sell. It nowhere appears that he ever represented to the public that he was selling the same article sold by complainants, except as their coal was comprehended by the word Pocahontas, which also justly described his own. He sold the product of the Browning mine, which is located adjoining the original mine of the Southwest Virginia Improvement Company, in the town of Pocahontas, the coal from which is now disposed of by the complainants as 'Pocahontas coal,' and it is proven that both collieries excavate from the same vein. As to the right of the Browning mine, one of the oldest in the field, to sell its product as 'Pocahontas coal' there can be no doubt, and it would be unconscionable to deny it. He also sold from the Indian Ridge mine, which is located within the 'Pocahontas coal field,' and it is shown that the complainants are now selling the output of the Rolfe and Arlington mines as 'Pocahontas coal,' both of which adjoin the Indian Ridge mine. The complainants themselves formerly sold the coal from this mine as 'Pocahontas coal,' and it is really difficult to understand why it becomes another article in the hands of the defendant. It is also set forth in the bill that the coal from the Indian Ridge section does not grade as high as that from other portions of the field, and that it had not been carefully inspected by the defendant before it was sold. But the evidence does not sustain the claim, and it appears that the complainants themselves have endeavored to again secure the right to sell this coal as 'Pocahontas coal,' since it has been so sold by the defendant, and we cannot believe that they would have made this effort had the grade of the product been inferior, or its inspection careless.

"The proof does not show that the appellant has practiced any deception upon the public, or that he has perpetrated any fraud upon the appellees. The appellant advertised and was selling coal obtained from the Browning and Indian Ridge mines, of the 'Pocahontas Flat Top Region,' and he did not represent it as purchased from the appellees, nor as mined by them. He has rep-

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resented it as coal from the Pocahontas field, and it was in fact such coal. He has made no false representations, and he has invaded no right to which the appellees can properly assert a claim."

XI. The respondent admits the allegation in the eleventh paragraph.

XII. The respondent admits the allegations in the twelfth paragraph.

XIII. As to the thirteenth paragraph, the respondent admits that the petitioners filed their bill in equity in the Circuit Court in the District of Massachusetts against W. C. Atwater & Co., of Fall River, Mass., but for greater certainty as to the allegations contained in that bill of complaint, and as to the proceedings in the Circuit Court of Massachusetts and the Circuit Court of Appeals for the First Circuit, the respondent says that the best evidence of what took place in those courts is a duly certified copy of the proceedings therein; and the respondent ought not be required to make further answer, but he is informed that a preliminary injunction was applied for by the petitioners, and secured against said Atwater & Co., enjoining them from applying the term "Pocahontas" to coal sold by them.

XIV. As to the fourteenth paragraph, the respondent still insisting that the petitioners should have produced a duly certified copy of the proceedings, states that Atwater & Co. appealed from the decision of Judge Colt allowing the preliminary injunction to the Circuit Court of Appeals for the First Circuit; and while this respondent has no direct personal interest in that suit, there has been sent to him, among other documents, a brief of petitioners' counsel, from which it appears that upon the hearing for preliminary injunction the whole question was not discussed, as appears from the following clause, quoted verbatim from the brief of the petitioners' counsel in the Circuit Court of Appeals:

"Such being the facts in the case, his honor, Judge Colt, upon the argument below, restricted the discussion to two points, viz: first, the relationship existing between Coffman and Atwater & Co.; and second, whether or not

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the coal sold to Atwater & Co. was exempt from the operation of the injunction order in the Coffman suit. In thus restricting the discussion, it was evident that Judge Colt was of the opinion that the decree of the West Virginia Court was prima facie evidence of the appellees' right to the trade mark and that that was sufficiently established for the purpose of the motion for preliminary injunction. On the merits the present case has been tried only before the West Virginia Court, and its decision was followed by Judge Colt after he had ascertained that Atwater & Co. were practically the agents of Coffman."

Respondent admits that on June 3, 1898, the Circuit Court of Appeals for the First Circuit rendered the opinion which is attached to the petition, but denies that that decision was based upon substantially the same state of facts as existed in the case finally decided in the Circuit Court of Appeals for the Fourth Circuit. In the Massachusetts case there was a motion for a preliminary injunction in which it was claimed that Atwater & Co. ought to be enjoined because this respondent was under injunction in the case pending in the Circuit Court at the time the coal was shipped to Atwater & Co., and upon the ground of privity between the respondent under injunction and Atwater & Co.; and it was the question of privity which was submitted to the court in the first instance, and upon which the preliminary injunction was granted, and the question which was reviewed and passed upon by the Circuit Court of Appeals was whether the preliminary injunction at the time it was allowed was a proper order. And it does not appear, and would not appear if the case was properly certified to this court, that the decision of the Circuit Court of Appeals was upon substantially the same state of facts as the case in the Fourth Circuit.

XV. As to the fifteenth paragraph, the respondent insists that the final disposition of the case, as announced by the Circuit Court of Appeals for the Fourth Circuit, having before it all the facts and testimony taken in that case, and the decision of the Circuit Court of Appeals for the First Circuit upon the question of preliminary injunction merely, with no

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evidence before it except the ex parte affidavits filed in support of and against the granting of that interlocutory order, is not such a divergence of opinion as to warrant this court in its discretion to bring the otherwise final decision of the Circuit Court of Appeals in the Fourth Circuit before it for review.

XVI. And as to the allegations in the sixteenth paragraph, the respondent admits that after the opinion of the Circuit Court of Appeals for the Fourth Circuit had been rendered, the petitioners asked for a rehearing, which said petition was denied on May 19, 1898.

XVII. And as to the allegations in the seventeenth paragraph, the respondent asserts that there was no error in the action of the Circuit Court of Appeals for the Fourth Circuit in this reversion of the decision of the Circuit Court for the District of West Virginia, and in remanding the cause with instruction to dismiss the bill. Nor was there error in the action of the Circuit Court of Appeals in denying the petition for a rehearing.

XVIII. And as to the eighteenth paragraph, the respondent insists that the decision of the case in the First Circuit cannot be brought before this court for review, because the act of Congress creating the Circuit Court of Appeals and providing that in certain cases the decrees of those courts might be reviewed in this court, applies specifically to final decrees only, and that a mere interlocutory decree cannot be reviewed in this court.

Respondent having fully answered, prays that the petition for certiorari may be denied, and for his costs in this behalf most unjustly sustained.

W. H. COFFMAN.

A. G. SAFFORD,
Attorney.

States of America } At Washington
District of Columbia } ss. In said District on this
17th day of October 1898, then personally appeared
W. H. Coffman and made oath that the foregoing
answer by him subscribed contains the truth
according to the best of his knowledge information
and belief. Before me
J. Y. Knight
Notary Public

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RESPONDENT'S BRIEF AND ARGUMENT.

The court should not entertain the motion of the petitioners for a writ of certiorari, because:

1. It is not shown that "the circumstances imperatively demand that form of interposition."

2. It is not shown that the question is of financial importance.

3. The petitioners have not certified to this court the proceedings in the Massachusets case.

4. The questions decided by the Circuit Court of Appeals for the First Circuit and the Circuit Court of Appeals for the Fourth Circuit were not the same.

5. The decision in the First Circuit was obtained upon *ex parte* affidavits merely, evidently so as to mislead that court in material matters.

6. The petitioners' case is without merit.

I.

IT IS NOT SHOWN THAT THE CIRCUMSTANCES IMPERATIVELY DEMAND THE INTERPOSITION OF THIS COURT.

The extraordinary process of certiorari is invoked by the petitioners under section 6 of the act of March 3, 1891 (26 Stat., 826), to review the final decision of the Circuit Court of Appeals for the Fourth Circuit, ordering the dismissal of the petitioners' bill filed in the Circuit Court for the District of West Virginia, substantially for the purpose of procuring a permanent injunction against the respondent from using the word "Pocahontas" as applied to the coal he was marketing, originating in the celebrated Pocahontas coal fields, situated in Virginia and West Virginia. (See maps, Record, 36 *et seq.*, 164 *et seq.*)

In cases of this character the writ of certiorari is not a writ of right; it is addressed to the sound discretion of the court. It is said in Lau Ow Bew's case (141 U. S., 583; 144 U. S., 47), that this branch of the jurisdiction of the court

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"should be exercised sparingly and with great caution," and in American Construction Co. *vs.* Jacksonville R. R. (148 U. S., 372), it is said that not only should this branch of the jurisdiction of the court be exercised sparingly, but adds that it should be done "only in cases of peculiar gravity and importance, or in order to secure uniformity of decision;" and up to that time only two writs of certiorari had been granted, although there had been many applications for the writ. In Chetwood's case (165 U. S., 443) it was said that "the writ may be allowed whenever the circumstances imperatively demand that form of interposition."

It is therefore clear that a case must present unusual and important features or it will not be considered in this court; and as the issuing of the writ is entirely within the discretion of the court, therefore, in arriving at a decision upon a question of this sort, the court will critically examine into the necessity of the proposed review, and the importance as well as the merits of the controversy.

In view of the extreme caution with which the court proceeds in cases of this kind it should not esteem a case to be important simply from the allegations contained in the petition, unless the allegations are supported by distinct and positive testimony, which is wanting in the case the petitioners have seen fit to present.

II.

IT IS NOT SHOWN THAT THE QUESTION IS OF FINANCIAL IMPORTANCE.

Whatever may be the real money value of this word as a trade-mark, the only evidence as to its value to be found in the Record is upon page 13, where it appears that the entire right to use the word was sold to the petitioners for the insignificant sum of five dollars, so recently as April 1, 1895.

The bill of complaint alleges that the right to use the word "Pocahontas" as a trade-mark for the coal produced in its mines originated with the Southwest Improvement Company, and from the assignment on page 13 of the Record, it appears that that company parted with all its right to use

that trade-mark for the sum mentioned; and while in ordinary cases it would hardly be proper to say that that sum necessarily represented the actual value of the thing conveyed, in a case of this kind, where jurisdiction is entertained with great caution and reluctance, proof of the magnitude of the interests involved should distinctly appear, and in the absence of such proof the court cannot assume the use of the name as a trade-mark to be of greater value than the sum for which it is stated to have been so recently sold.

III.

THE PETITIONERS HAVE NOT CERTIFIED TO THIS COURT THE PROCEEDINGS IN THE MASSACHUSETTS CASE.

The petitioners have filed with their writ a certified copy of the transcript of record of the case in the Fourth Circuit, but they have only brought into the case in this court an uncertified copy of the opinion of Judge Putnam from the proceedings in the First Circuit, which appears as an appendix to their petition, and the petition should be dismissed because they have not presented a full record of the cases in both courts.

IV.

THE QUESTIONS DECIDED BY THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT WERE NOT THE SAME.

It is alleged in the brief *contra* that the cases are practically identical; enough appears in the opinion of Judge Putnam, as recited in the petition, to demonstrate that the questions considered by the two courts are not even similar. The decision of the Circuit Court of Appeals for the Fourth Circuit, which was argued November 8, 1897, and decided favorably to the respondent May 3, 1898, after seven months deliberation, and again decided favorably to the respondent May 19, 1898, upon a motion by the petitioners for a re-

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hearing, was based upon a careful finding of the facts set out in full in the opinion of Judge Goff, hereto annexed, and proceeded substantially upon the grounds that the claims of the petitioners in the original bill "were very largely erroneous and not proven;" that when the first coals were sent to the market in July, 1883, and for more than a year before that time, the name "Pocahontas" had been used as a geographical name indicating the locality; that a Government post office had been established, for a year or more at that point, under the name of "Pocahontas," and that name had also, before the establishment of the post office, been given to the railroad station at that point, and the court found, therefore (and could not properly have found otherwise), that the word "Pocahontas," before the appearance of the coal of this extensive field in the markets of the country, had become a word of well-known geographical significance, not only then applied to the post office, the settlement and the railroad station, but also the whole field itself, denoting that large and valuable section of the Virginias, famed the world over for the remarkable, valuable and useful coal and coke that it produces of a uniform character (Record, pp. 151 *et seq.*); and applying to the facts so found, from a consideration of the whole case, bill, answer, replication and proof, that doctrine of the law so often recognized by repeated decisions of this court, that a geographical name cannot be appropriated to the exclusive use of a person or corporation as a trademark, the Circuit Court of Appeals for the Fourth Circuit brushed aside the gauzy, cob-webby, fictitious claim of the petitioner to the exclusive use of this geographical name, and held that every operation in this important field, every operator in this great industrial production, each and all had the right to market coals under that name, because that name correctly indicate its geographical origin.

On the other hand, the case decided in the First Circuit, as appears from the opinion of Judge Putnam, was not in any sense a final decree; it was only a decision upon appeal from an interlocutory order allowing an injunction in the case of the petitioners against Atwater & Co., as appears from the

first paragraph of the opinion, where it is said that "*this is an appeal from an order granting a temporary injunction*, and relates to the alleged trade-mark or trade-name, 'Pocahontas,' used in the coal traffic."

The original order allowing the injunction and the decision on appeal were not based upon anything except the *ex parte* affidavits filed upon the motion for a preliminary injunction; in this court we do not know what the affidavits were, but we do know that the discussion was restricted to a mere question of agency, as appears from the following citation from the brief filed in the Circuit Court of Appeals for the First Circuit by the same counsel who appear here in this proceeding for the petitioners. The citation is from page 7 and is as follows:

> "Such being the facts in the case, his honor, Judge Colt, upon the argument below, restricted the discussion to two points, namely: *First*, the relationship existing between Coffman and Atwater & Co.; and *second*, whether or not the coal sold to Atwater & Co. was exempt from the operation of the injunction order in the Coffman suit. In thus restricting the discussion it was evident that Judge Colt was of the opinion that the decree of the West Virginia court was *prima facie* evidence of the appellee's right to the trade-mark, and that that right was sufficiently established for the purposes of a motion for preliminary injunction."

The exact question presented to the Massachusetts court was whether a preliminary injunction should be issued, and the decision was based solely upon the question as to whether Atwater & Co. should be enjoined in Massachusetts by a preliminary order for the reason that Coffman had been placed under injunction by the Federal court in West Virginia, and had shipped coal pending the injunction to Atwater & Co., and that firm had placed it upon the market to be sold as "Pocahontas" coal; and upon the motion for the preliminary injunction the claim was made that Atwater & Co. were the agents of Coffman and that the injunction against Coffman in West Virginia should be operative against Atwater & Co., his agents in Massachusetts, the argument being restricted to these points by Judge Colt in the inferior court; of course,

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nothing else but the question of agency could be properly considered in the appellate court. The conclusion of law which Judge Putnam decided was that as the injunction was proper when issued by Judge Colt, he could not do otherwise than to sustain his ruling, and without reference to what had occurred in the interim. This appears from the following extract from his opinion:

> "Since the granting of the injunction in the case before us by the court below, and since the appeal to this court and the arguments at bar on the appeal, the Circuit Court of Appeals for the Fourth Circuit, in Coffman *vs.* Castner, by an opinion passed down May 3, 1898, has held that the claimed trade-mark, or trade-name 'Pocahontas' cannot be sustained, and has reversed the adjudication of the Circuit Court to which we have referred, and has remanded the cause to that court with instructions to dismiss the suit. As the complainants in this case were the complainants in the case in the Fourth Circuit, it may be that if this had occurred before the action of the court below, now appealed from, no temporary injunction would have been granted. But as the injunction was granted before the decision by the Circuit Court of Appeals was announced, the position is radically different. THE ORDER WAS CLEARLY PROPER WHEN MADE, AND IF THE CIRCUMSTANCES REMAINED UNCHANGED WE COULD NOT REVERSE IT."

But that there might not be any misunderstanding as to the exact decision, he says:

> "Some incidental matters were brought to our attention by the parties, but we believe all of them are rendered unimportant in view of the conclusions which we have stated. *As neither party takes from our decision anything substantial,* and as the circumstances are without precedent, we are not satisfied that equity requires that the appellants should pay the costs of this appeal."

There can be but one conclusion; the decision in the Fourth Circuit was upon the whole case, the decision in the First Circuit was upon a preliminary question only, and that question was restricted to one of agency between Coffman and Atwater & Co., a question which could not have arisen in the Virginia case; the proposition which was sustained by Judge

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Colt, and by the Circuit Court of Appeals in the First Circuit was based upon the theory that the decision of the Virginia court established a *prima facie* case, and the right of the petitioners to appropriate the name of "Pocahontas" as a trademark was considered as settled for the purposes of the Massachusetts case, and for that reason was not permitted to be inquired into. The finding of the Virginia court (now overruled), was accepted as conclusive upon the property right of the petitioners, and the only question was whether the affidavits filed in support of the motion for the preliminary injunction sufficiently established a condition of agency between the defendants in the Massachusetts case and the defendant under injunction at that time in the Virginia case.

The decision in the Court of Appeals for the First Circuit, Judge Putnam presiding, seems to have been one of practice merely, and to have involved a construction of the recent legislation allowing appeals from interlocutory orders allowing injunctions; the appellate court, in this instance, holding that it would not consider any new circumstances or conditions which might arise between the time of the granting of the injunction in the inferior court and the hearing upon that question in the appellate court, presumably holding that if any new circumstances or conditions had arisen in the interim they must first be presented to the inferior tribunal before they could be considered by the appellate tribunal. If this be the correct interpretation of the new statute, it certainly tends to vexatious delays in the administration of justice. In the case at bar the preliminary injunction was granted in the inferior court, taking for granted that the petitioners had a meritorious case, because the court of a sister jurisdiction had then so held and had issued its injunction; and so that court would permit no inquiry back of the relation of agency which was claimed to exist between the defendant in the one jurisdiction and the defendants in the other, and while the injunction granted in the second jurisdiction was pending, the controlling appellate court in the first jurisdiction disposed of the petitioners' case there upon a careful consideration, for want of equity, and so the anoma-

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lous situation is found that parties are under injunction upon a conclusion that their adversaries have a meritorious case on the doctrine of *stare decisis*, after the decision no longer stands. The learned judge, who delivered the opinon in the Massachusetts case, seems to have overlooked that the structure built up in the inferior court had lost its foundation, and sent the litigating parties back to the inferior tribunal upon this merely preliminary question, for a decision as to the new circumstances and conditions that had intervened, and months hence all the parties will probably be back in the appellate court to have heard and determined the question which seems to have been fully before the appellate court, and could have been properly determined finally without being tossed backwards and forwards between the two branches of the court in the Fourth Circuit.

Lack of uniformity of decision can only occur where the same questions are submitted and considered by each of the courts.

Had there been a decision by the Circuit Court of Appeals for the First Circuit that the petitioners had the exclusive right to the use of this word as a trade-mark, after hearing all the proofs submitted by both parties in support of their respective pleadings and an exactly opposite decision against the petitioners by the Court of Appeals for the Fourth Circuit, and it had been shown by evidence (which is wanting here) that the subject matter of the litigation was of importance, financially or otherwise, possibly the court would be warranted in issuing the writ prayed for, but that is not the situation which this case presents; on the one hand we have a full, complete and exhaustive trial and adjudication of a question, properly and zealously submitted, resulting in a final decree which cannot be reviewed except upon a case so made out as to appeal irresistibly to the sound discretion of this court; on the other hand, the so-called differing decision was in no sense final but preliminary, interlocutory and temporary merely, and where the substantial merits of the petitioners' case was assumed erroneously, as it turns out, and heard and determined on *ex parte* affidavits, in a cause before pleadings, ex-

cept the filing of the bill and before the taking of any proof whatsoever. Surely, this cannot be said to present "identity of question" or "divergence of decision." It is true that Judge Putnam, in his decision, intimates that by reason of long acquiescence in the use of the trade-mark by the petitioners, they may have acquired a proprietary right to this word, but it is to be remembered that the whole case was not before him, and it is shown in a subsequent portion of this brief that Judge Putnam was misled as to material facts.

Again, Judge Putnam intimates that had the Circuit Court for the Fourth Circuit dismissed the bill on appeal before the case was brought in Massachusetts, no temporary injunction could have been granted. If that be so, how can it be said that this court will now take jurisdiction? If the dismissal of the Virginia case would prevent a preliminary injunction in the Massachusetts case, by analogous reasoning such dismissal ought to prevent consideration of the present petition by this court.

V.

THE DECISION IN THE FIRST CIRCUIT WAS RENDERED UPON EX PARTE AFFIDAVITS MERELY, EVIDENTLY SO FRAMED AS TO MISLEAD THAT COURT IN MATERIAL MATTERS.

This proposition appears conclusively from the following citation from Judge Putnam's opinion:

> "This" (the word Pocahontas) "has been used for fully twenty years by the complainants below and their predecessor in a very extensive trade with unbroken acquiescence until the controversy out of which this litigation arose in this circuit and in the fourth circuit."

Now it conclusively appears that the name "Pocahontas," as applied to the territory producing this coal, did not exist until 1882; it was not applied to shipments of coal until 1883; it was not attempted to be registered in the Patent Office until 1885; instead of there being an acquiescence on the part of the public in the exclusive use by the petitioners of this word as designatory of their coal, there has

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been a long-continued acquiescence on the part of petitioners "until the controversy out of which this litigation arose" in the use by all of the operators in that field of this word as designating their output, quite a respectable percentage of that output not being represented by the petitioners.

Mark the words of Judge Putnam that this word had been used for FULLY twenty years (prior to 1896) by the complainants and their predecessor.

Could the petitioners here have shown to the Massachusetts court, as appears from the affidavit of Castner, that in 1881 the present coal field was an unexplored wilderness? Certainly not; "fully twenty years" would carry the use of this word to a date five years before the time when Castner describes the field as having not even been explored.

Could the petitioner, Castner, have stated in his affidavit in the Massachusetts case, as he states in this case, that it was not until 1882 that the mines were opened, or that the first shipments of coal were made in 1883? Certainly not; it would be an insult to the intelligence of the learned and painstaking judge, who rendered the decision in the First Circuit, to suppose that upon the showing made in this case he would have extended the period of the unsupported claim of barely thirteen years to "fully twenty years."

And in regard to the finding by Judge Putnam that the complainants below had used this word, "with unbroken acquiescence," it cannot be possible that it was shown in that case, as appears from their own evidence in this, that more than a year before any shipment of coal was made under the name of "Pocahontas" the entire field, the settlement, the post office and the railroad station were all known by that name. Nor could it have appeared, as the petitioners by their own evidence claim to have been the situation in the Virginia case, that this name, by acquiescence of the petitioners and the Southwest Virginia Improvement Company, had been used as designating coal other than that produced by the mines of the Southwest Company; nor that from 1884 to the advent of the respondent as a factor and dealer in coal at Pocahontas, the "combine," consisting of all the operations in the field,

practically sold all of their coal to the Norfolk & Western Railroad Company, who appointed the petitioner's corporate predecessor as "general tidewater agent," and who handled only seventy per cent of the output of the mines through that agency; the remaining thirty per cent having been disposed of by the "general coal agent," altogether a different official from the "general tidewater agent," appointed by the Norfolk & Western Railroad Company under the coal producers' contract; all being sold as "Pocahontas" coal; therefore, it could not have been shown in the Massachusetts case the fact which so plainly appears in this case, that at no time since the opening of the field have the Southwest Virginia Improvement Company or Castner & Curran been the only operators to use that word as descriptive of the coals they sent to market.

Instead of there having been, therefore, an "unbroken acquiescence" in the exclusive use of this word by the petitioners, it may be well said that there has been an unbroken acquiescence on the part of the Southwest Virginia Improvement Company and the petitioners to the use of this word by operators and producers and sellers of coals other than those produced by that company.

So much for the actual misrepresentation of the facts which it is apparent must have been made by the petitioners in order to have so thoroughly misled the courts in the Massachusetts case. It must also have been true that the truth was suppressed in many particulars. Could the petitioners have brought to the attention of the Massachusetts court the application made by Castner & Curran to register this word in the U. S. Patent Office, in August, 1885, claiming it as their own symbol to the exclusion of the Southwest Virginia Improvement Company, under whom they sometimes claim, and every one else? Could they have furnished to that court the exact date of the establishment of the post office and all those other facts which show, conclusively, that in this coal field the word "Pocahontas" referred to the general coal deposit and not to coal having its origin with the petitioners?

All of these suggestions must be answered in the negative.

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That Judge Putnam was imposed upon in these particulars is plainly apparent from the language he used, which is quoted above, and his order is plainly based upon the meagre, misleading and incorrect statements which zealous counsel evidently saw fit to put into the *ex parte* affidavits filed in support of their motion for the preliminary injunction; we appeal with confidence to the finding of the court in the Fourth Circuit as to all the facts pertaining to this controversy, and particularly as to the subject of acquiescence, bearing in mind that the petitioners' claim is based upon the pretension that the word "Pocahontas" relates to coal inspected by them; "acquiescence" means acquiescence in that claim, for there could be no such thing as acquiescence in the use of a geographical name simply unless it imported some special characteristic pointing to the petitioners. On this point Judge Goff says:

> "Pocahontas is a word of well-known geographical significance."
>
> "The entire field is now known as Pocahontas and the Pocahontas Flat Top Coal Field."
>
> "The word Pocahontas then (1883) denoted the locality at which the article in which the company was dealing was mined, as well as the point from which it was shipped, and it also indicated in business matters the *natural product of all that region.*"
>
> "The complainants are not entitled to the exclusive right to use the word Pocahontas as descriptive * * * of the character of the coal mined in the Pocahontas coal field, and all the producers of that product in that section have the right to use it in common with the complainants. That word has acquired a generic meaning, and from the evidence before us it is clear that in the business world it is used to indicate the place where the coal is produced, and that it does not point to either the producer or the vender of the same. All the mine owners, who by their labor succeeded in establishing their industries in that section, have the right to use in their business the geographical word which is the recognized designation of the same, and that points to the product peculiarly indicative of its wealth."

VI.

THE PETITIONERS' CASE IS WITHOUT MERIT.

It is quite unnecessary to amplify upon the opinion of the Circuit Court of Appeals for the Fourth Circuit, as announced by Judge Goff, and I assume that this court will accept the facts as stated by the court, should the court reach the question of the merits of the petitioners' case.

I desire, however, to call the attention of the court to some considerations which are not touched upon by Judge Goff in his opinion, but which seem to me to be in and of themselves controlling of the question.

(*a*) While the output of the Pocahontas coal field is quite extensive, there is still left in that field a very large territory wholly undeveloped, through which this valuable deposit exists of a uniform character. (Record, p. 151 *et seq.*) The petitioners claim to have given a geographical name to the locality, and the same name to the coal which the case shows to be of a uniform quality; and whether the name was given first to the locality or the coal deposit, is not a matter of importance; because having combined the geographical name with that of coal, the entire deposit is now known in the market by the name of Pocahontas. They have given that name, therefore, not only to the product of the Southwest Company but also to the product of all the collieries they have from time to time represented, irrespective of the exact place of production, and so they have attached the name to all the vast territory, and for this reason ought not to be permitted a monopoly of the name.

(*b*) When this bill was filed the respondent was the factor and agent for the sale of the product of the Browning mines, which are located within the town of Pocahontas, and that product had formerly been sold by petitioners as Pocahontas coal; there can be no question, therefore, as to his right to sell the product of those mines as Pocahontas coal; he was also, at that time, the agent and factor for the sale of the product of the Indian Ridge Mines, for which the petitioners had previously been the agents and factors; and while the petitioners were the agents for both these mines they marketed

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the product as Pocahontas coal, and had caused it to be known in the public markets by that name; and having impressed that name upon the product when they surrendered their agency, it having become known by the name they claim to have given it, they cannot deny the after use of that name to the owners.

(*c*) The court will observe that the petitioners have not adhered to the same claim with reference to their right to use this word as a commercial trade-mark. Up to the time of the bringing of the suit they claimed under the registration of August, 1885, in which it was only claimed that the trade-mark had been used continuously since about January 1, 1885. As the case shows that long prior to that time the word had become a well-known geographical name, the petitioners seem to have abandoned all claim on account of that registration and now try to rely on the right of the Southwest Virginia Improvement Company, which they say originated in 1882; the court will not fail to observe that if the right upon which they now rely as assignee of the Southwest Improvement Company existed in August, 1885, the application at that time of the petitioners for registration of that word as their trade-mark was a fraud upon the rights of the Southwest Company.

No one can read this case without coming to the certain conclusion that the geographical name of the locality in which these extensive mines are situated gave the name to the coal in the market; and it would be unconscionable to permit the owners of so small a portion of this vast field to now monopolize that name which they have at least abandoned to the scandalous and illegal combination, provided for by the coal producers' contract, to be found on pp. 19 *et seq.* of the Record. It is that combination of interests which seeks, in this illogical proceeding, to shut out of the markets of the world all of this great coal-producing field, excepting only those operators who are willing to subject themselves to the domination and control of the only railroad serving that locality, and its wicked side-partners and whippers-in, who are the petitioners for this extraordinary writ.

Respectfully submitted,

A. G. SAFFORD,

Attorney for Respondent.

United States Circuit Court of Appeals.

FOURTH CIRCUIT.

No. 231.

W. H. Coffman, Appellant,
vs.
Samuel Castner, Jr., and Henry B. Curran, Appellees.

In Equity.—Appeal from the Circuit Court of the United States for the District of West Virginia.

(Argued November 8, 1897. Decided May 3, 1898.)

Heard by Goff, Circuit Judge, and Brawley and Purnell, District Judges.

S. C. Graham, of Henry & Graham, Counsel for Appellant;
Arthur V. Brieson (J. Walter Douglass and Henry E. Everding, on Brief), Counsel for Appellees.

Goff, Circuit Judge:

This is an appeal from an order of the Circuit Court for the District of West Virginia, entered on the 5th day of May, 1897, in the chancery cause of Samuel Castner, Jr., and Henry B. Curran, trading under the firm name of Castner & Curran, against W. H. Coffman, doing business under the name and style of Pocahontas Coke and Coal Company, and also as W. H. Coffman Coke Co. By such order the defendant below, appellant here, was in his own name, and in the name of the Pocahontas Coke and Coal Company, and also as the W. H. Coffman Coke Company, together with his servants, attorneys and associates, restrained and inhibited from using the name "Pocahontas" or "Pocahontas Flat Top" in connection with his business, the court being of the opinion that "the complainants have a right to use the said word 'Pocahontas' for the purpose of indicating that the coal was from the Pocahontas field, and that they have the sole right to use said word as indicating the character of coal they sell." From this decree the defendant below, under the provisions

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of section 7, of the act approved March 3, 1891, entitled "an act to establish Circuit Court of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," sued out this appeal.

The bill alleges that about the year 1882, in the State of Virginia, a tract or field of smokeless bituminous or semi-bituminous coal was opened and mined by the Southwest Virginia Improvement Company, a corporation organized and doing business under the laws of the State of Virginia; that shortly thereafter, but still in the year 1882, the said corporation named their mine "Pocahontas" and began selling the coal therefrom as "Pocahontas" coal, having adopted the trade-mark "Pocahontas" as designating its said output; that prior to the first day of January, 1884, Castner & Co., Limited, a partnership formed under the laws of the State of Pennsylvania, did purchase from the said Southwest Virginia Improvement Company the coal so mined, and did ship and sell the same principally at tidewater points under the name of "Pocahontas" coal; that they as such partnership association dealt in, inspected, shipped and sold from said region or field as "Pocahontas" coal in large quantities, and under the license of the Southwest Virginia Improvement Company, advertised, shipped, and billed the same "Pocahontas" coal, uniformly designating it as such coal; that in the year 1889 the complainants became the successors and assigns of said Castner & Co., Limited, and continued the same business under the name of Castner & Curran, dealing in and selling large quantities of said coal under the trade-mark designation of "Pocahontas" coal, shipping, billing and advertising the same as "Pocahontas" coal, and as "Pocahontas" Flat Top coal, and that they, by reason of the careful inspection and purification of their coal, greatly increased from year to year the sale of the same; that complainants and their predecessors, Castner & Co., Limited, from the year 1883 until the bringing of this suit, during the first twelve years thereof, with the license of the Southwest Virginia Improvement Company, and thereafter as owners of the said trade-mark, uninterruptedly carried on said coal business, and have continuously inspected, shipped and sold large quantities of coal under the said trade-mark of "Pocahontas;" that on April 1, 1895, by an assignment in writing duly executed by the Southwest Virginia Improvement Company, the complainants became the owners of the entire right and title, interest and good will in and to the trade-mark "Pocahontas," with the exclusive right to use said word as a designation for all coal thereafter sold by them from said field, and became vested also with the exclusive right to sue and recover for all gains, profits and damages arising out of past, present or future infringements of the same; that they have devoted much time and expended large sums of money

in inspecting, selecting, grading and maintaining the superior quality and purity of the said coal, whereby it has acquired and now possesses a great reputation in the markets of the world under the name of "Pocahontas," or "Pocahontas" Flat Top coal, and that it has been and is now much sought after by dealers and the public; that complainants have the sole and exclusive right to the use of the word symbol "Pocahontas" as a trade-mark for coal, and that it is of great value to them in their business. It is also set forth in the bill that the public and the dealers in coal have generally acquiesced in complainants' exclusive rights to such use, and that they have not knowingly permitted the unlawful use of such trade-mark by others; that prior to November 1, 1896, complainants controlled the output of the various collieries in what is known as the "Great Flat Top Coal Region," including the Indian Ridge Coal & Coke Company; that they sold so much of this output as came up to the grade of "Pocahontas" coal in quantity, purity and size as "Pocahontas" coal, but that the output of the Indian Ridge Company was impure and required special care and attention, and yielded but a small proportion of the "Pocahontas" coal, as it was marketed by complainants; that the defendant, W. H. Coffman, is a factor or agent engaged in the sale of coal and coke at Bluefield, West Virginia, and elsewhere, selling and advertising for sale bituminous and semi-bituminous coal from the Indian Ridge Colliery, which is inferior in quality and purity to the coal sold by complainants, and is not of the standard as to quality and purity established by them; that he, intending to deceive dealers and the public, and to cause purchasers of his coal to believe that the same was sold by complainants, or is of the quality sold by them, has at Bluefield and elsewhere offered for sale and sold a very inferior and impure coal under the name and designation of "Pocahontas," and has in advertising and selling the same used the word symbol "Pocahontas," and in letters, notes and bills has displayed the words "Pocahontas Coal," or "Pocahontas" Flat Top Coal, whereby the purchasers of his coal are liable to be, and will be deceived, and caused to purchase defendant's coal as that sold by complainants; that as a matter of fact purchasers have been so deceived, and that the reputation of "Pocahontas" coal has been thereby tainted; that the defendant intends to and will continue so to do, unless prevented by the order of the court below. Other statements in the bill are not referred to, the same being unnecessary so far as the questions we are now to consider are concerned. A large number of affidavits were filed by complainants and defendant, which, as well as the answer of the defendant, treated as an affidavit, and the exhibits with it and the bill were read and considered by the court in disposing of the motion for an injunction.

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Certain propositions of law, now well established, applicable to this case, will be referred to in the outset as guiding us in our investigation of the same, and as plainly indicating, in connection with the facts as we find them, the result we now announce. A trade mark is intended to designate the origin of the particular article to which it is affixed, or to which it particularly refers, and it gives notice to the world who the producer of that article was. A name may be used for this purpose, or a certain mark or peculiar device may be employed, provided they have not theretofore been appropriated by others for the same purpose. But the right to select such names, marks and devices is governed by certain rules and limitations which have been found and announced by the courts. On this point the Supreme Court of the United States in Canal Company vs. Clark, 13 Wall., 311, 323, said: "The trade mark must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association. And there are two rules which are not to be overlooked. No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection. As we said in the well-considered case of The Amoskeag Manufacturing Company vs. Spear, 'the owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any word, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or symbol, which, from the nature of the fact it is used to signify, others may employ with equal truth, and, therefore, have an equal right to employ for the same purpose.'

"And it is obvious that the same reasons which forbid the exclusive appropriation of generic names, or of those merely descriptive of the article manufactured, and which can be employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names, designating districts of country. Their nature is such that they cannot point to the origin (personal origin) or ownership of the article of trade to which they may be applied. They point only at the place of production, not to the producer, and could they be appropriated

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exclusively the appropriation would result in mischievous monopolies. Could such phrases as 'Pennsylvania wheat,' 'Kentucky hemp,' 'Virginia tobacco,' or 'Sea Island cotton' be protected as trade marks; could any one prevent all others from using them, or from selling articles produced in the districts they describe under those appellations, it would greatly embarrass trade, and secure exclusive rights to individuals in that which is the common right of many. It can be permitted only when the reasons that lie at the foundation of the protection given to trade-marks are entirely overlooked. It cannot be said that there is any attempt to deceive the public when one sells as Kentucky hemp or Lehigh coal, that which in truth is such, or that there is any attempt to appropriate the enterprise or business reputation of another who may have previously sold his goods with the same description. It is not selling one man's goods as and for those of another. Nothing is more common than that a manufacturer sends his products to market, designating them by the name of the place where they were made. But we think no case can be found in which other producers of similar products in the same place have been restrained from the use of the same name in describing their goods. * * * It is only when the adoption or imitation of what is claimed to be a trade-mark amounts to a false representation, express or implied, designed or incidental, that there is any title to relief against it. True it may be that the use by a second producer in describing truthfully his product, of a name or a combination of words, already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth."

In the same case it was held that the word Lackawana, the name of a section of the State of Pennsylvania, could not be combined with the word coal, and made a trade-mark which would be protected by law, for the reason that every one who mined coal in the valley of the Lackawana was entitled to the right of representing it as coming from that region and as being Lackawana coal

In Columbia Mill Co. vs. Alcorn, 150 U. S., 460, 466, the Supreme Court says: "The appellant was no more entitled to the exclusive use of the word 'Columbia' as a trade-mark than he would have had to the use of the word 'America,' or 'United States,' or 'Minnesota,' or 'Minneapolis.' These merely geographical names cannot be appropriated and made the subject of an exclusive property. They do not, in and of themselves,

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indicate anything in the nature of origin, manufacture, or ownership; and in the present case the word 'Columbia' gives no information on the subject of origin, production, or ownership." In the same case it was said: "These cases establish the following general propositions: (1) That to acquire the right to the exclusive use of a name, device, or symbol, as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark must point distinctively, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed as its primary object and purpose to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. (2) That if the device, mark, or symbol was adopted or placed upon the article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark. (3) That the exclusive right to the use of the mark or device claimed as a trade-mark is founded on priority of appropriation; that is to say, the claimant of the trade-mark must have been the first to use or employ the same on like articles of production. (4) Such trade-mark cannot consist of words in common use as designating locality, section, or region of country."

In Laughman et al. vs. Piper et al., 128 Penn. S., 1; 5 L. R. A., 599, it was held that when the article to which a geographical name is applied is the product of the place named, the term cannot be used as a trade-name by one to the exclusion of others, owners of like produtcs of the same place; hence the term "Sonman," which has received a distinct geographical recognition from the public, it being the name of a large boundary of land containing a number of private estates owned by different persons, all of whom are engaged in the same business of mining and shipping coal, and having within its limits a village of the same name, cannot be appropriated by one of such persons as a trade-name to the exclusion of the others, although the tract is not an independent region, and cannot be considered a separate coal basin or sub-basin.

In the case of Glendon Iron Co. vs. Uhler, 75 Pa., 467; 15 Amer. Rep., 599, the court said: "Glendon is the name of the town in which the business of each party is located and carried on. It is an incorporated borough. Being then the name of an incorporated town, the main question is whether the appellant lawfully has the exclusive right to use it as a trade-mark. It is conceded as a general rule that the name of a town or city cannot be so appropriated as the exclusive property of any one. This view is well sustained by authority. High on Injunctions,

673; Bispham's Eq., 411; Wolfe vs. Goulard, 18 How. Pr., 64; Brooklyn White Lead Company vs. Masury, 25 Barb., 416; Newman vs. Alvord, 49 id., 588; Candee vs. Deere, 54 Ill., 439; S. C. 5 Am. Rep., 125; Del. & Hud. Canal Co. vs. Clark, 13 Wall., 411.

"It is contended by the appellant that this case is taken out of the general rule, inasmuch as the trade-mark was adopted prior to the incorporation of the borough, and before there was any town at that place. No authority is cited which supports this distinction. The case of Woterspoon vs. Currie, 23 L. J. Rep., 443, is clearly distinguishable. It is known as the Glenfield starch case. It is true the injunction was there granted; but the complainant and respondent were not both engaged in carrying on the same business in the same town or city. There was no town, no city there. The Lord Chancellor says: 'Glenfield is not a town, * * * it is not a parish, it is not a hamlet, it is not a district of any special character, but it was an estate of that name upon which some people seem to have erected some houses or manufactories, and upon which now some sixty people are living.' It will not do to apply to an incorporated borough in this State the same rule that may be applicable to an estate in England. Such a borough is essentially of a public nature; the estate is of a more private character. The name which an individual may give to his estate is unlike that which legislative sanction has given to a municipal corporation. The rights of the public in each are radically different.

"The appellee did not falsely represent the place of their business location. Their pig-iron was actually manufactured within the borough of Glendon. * * * The appellees put upon their pigs the initials of their firm and the name of their town. That name was Glendon to the whole world. It cannot be that the previous appropriation by the appellants of the word which now is the name of the town prevents any other manufacturer of pig-iron, within its limits, from using the same word. If it be so now it may continue through all coming time. The boundaries of the town may be enlarged. The borough may grow into a city. The manufactories of pig-iron may be multiplied, yet the word most expressive to indicate their location must be denied to all, save one. * * * We see nothing in the facts of this case, even as found by the master, to take it out of the general rule which denies to one the exclusive use as a trade-mark of the name of the town in which the same kinds of goods are manufactured by others."

In Connell vs. Reed, 128 Mass., 477; S. C. 35 Am. Rep., 397, Chief Justice Gray says: "Although the master reports that there was no evidence that any other person than the plaintiffs or their agents had ever used these words ('East Indian') in connection with the manufacture and sale of medicines, it is at least doubtful

whether words in common use as designating a vast region of country and its products can be appropriated by any one as his exclusive trade-mark, separately from his own or some other name in which he has a peculiar right." In the case of Evans vs. Von Laer, 32 Fed., 153, Judge Colt held that as Montserrat was the name of an island in the West Indies from which both the plaintiff and defendant imported lime juice, the former, in the absence of fraud, was not entitled to the exclusive use of the word "Montserrat" as a designation for lime juice, even though the plaintiff's article may have acquired a high reputation for purity and strength, while that of the defendant was of an inferior quality.

In Genessee Salt Co. vs. Burnap, 73 Fed., 818; 20 C. C. A., 27, 43; U. S. App., 243, 250, the court said: "It is well settled, and we have just had occasion to decide in this court that words merely descriptive of the character, quality, and composition of the article, or of the place where it is manufactured or produced, cannot be monopolized as a trade-mark. California Fig Syrup Company vs. Frederick Stearns & Company, 43 U. S. App., 234; Brown Chemical Company vs. Myer, 139 U. S., 540; Canal Company vs. Clark, 13 Wall., 311. The name 'Genessee,' when used in connection with the complainant's salt, obviously refers to the place of its production. The complainant could, therefore, assert no trade-mark property in it."

In the case of Candee, Swan & Co. vs. Deere & Co., 54 Ill., 439; S. C. 5 Am. Rep., 125, the court held that there can be no trade mark in the words "Moline Plows," as Moline was the name of the town in which the plows were made, and said: "Is it possible, can it be tolerated for a single moment, that a maker of plows at Moline shall not be permitted to sell his work as a Moline plow; to advertise them in every form as the Moline plow? Would it not be the truth, and shall a manufacturer be prevented from publishing to the world where his wares are made? * * * Any number of plow makers can go with impunity to Moline and establish there plow factories, and brand on their plows their own name and the name of the town, and send them broadcast over the country, to the joy of our farmers and to the common benefit of all."

These cases firmly establish the questions of law applicable to the contention we are now to dispose of, and they clearly indicate the result we have reached. A geographical name cannot be appropriated to the exclusive use of any person or company, as a trade-mark, and if adopted as such it must be used subject to the right of others doing business in the section of country to which it applies, to make like use of it in matters properly pertaining to their business in that locality.

It is clear from the evidence that Pocahontas is a word of

well known geographical signification, denoting that large and valuable section of the Virginias, famed the world over for the remarkably valuable and useful coal and coke that it produces. Prior to 1882 this region was comparatively unknown, and entirely in the primeval state in which nature had left it, constituting a part of the Great Flat Top Mountain portion of Southwest Virginia and southeast West Virginia. In the years immediately preceding 1882 this wilderness had been sought out and explored by those who represented the capital and energy by which it was afterwards developed. The experts sent into its theretofore hidden recesses returned with the report of its fabulous wealth and wonderful possibilities. The result was the extension of the Norfolk & Western railroad into and through the Great Flat Top region, and the organization of the Southwest Virginia Improvement Company, under whose auspices the mines were opened and coal was first shipped. The development inaugurated by this company was commenced during the fall of 1881, continued in the year 1882, and the railroad was completed to the mines in the spring time of the year 1883. The town located at the point where the first mine was opened was early in the year 1882 named Pocahontas, and the postoffice which was established by the Department at Washington on the 30th day of June, 1882, was likewise then called by the same name. The first coal shipped to the tide-water markets left the mines in July, 1883, and it was billed and sold as "Pocahontas Coal."

The entire field is now known as the "Pocahontas" and the "Pocahontas Flat Top Coal Field." It embraces large portions of Tazewell and Wise counties in the State of Virginia, and of Mercer, McDowell, Wyoming and Raleigh counties in the State of West Virginia. It is divided into three sections, or working divisions; the Pocahontas, which includes all the mines around the town of Pocahontas; the Bluestone District, embracing the improvements on the Bluestone River; and the Elkhorn, the country in McDowell county on the Flat Top Mountain. The coal shipped from all this section is known in the markets of the world as "Pocahontas coal," evidently so called from the town of that name in which the first mine was located, and from which the first shipments were made. The coal beds are above the water level and range from five to thirteen feet in thickness, extending through an area of about five hundred square miles, or three hundred and twenty thousand square acres. An actual survey of the outcrop of this field discloses that about one-third of the territory is barren, and that there are near two hundred and thirteen thousand square acres underlaid with the Pocahontas vein of coal. A moderate estimate gives to each square acre 10,000 tons of marketable coal, or say two billion one hundred and thirty million tons. At the time when this suit

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was instituted, thirty-eight different coal and coke companies were operating in the field, all of them advertising, mining and selling the coal excavated from the Pocahontas vein, and known as the "Pocahontas Flat Top Coal." For the manufacture of coke over five thousand ovens had been constructed and were in use. During the year 1883 ninety-nine thousand eight hundred and seventy-one tons were mined, the output in the following years rapidly increasing until, in 1894, three million eight hundred and eighty-eight thousand and fifty-eight tons were sent to market. For the purpose of illustrating the almost inexhaustible resources of the field, it may be stated that at this rate of production,—as shown by the returns for the year 1894,—it would require about five hundred and forty-eight years to exhaust the seam now being worked. And it is as to this entire body of coal that the complainants claim the exclusive right to use the word "Pocahontas," as descriptive of its origin and quality.

There is no evidence to sustain the allegation in the bill that the Southwest Virginia Improvement Company began selling coal in the year 1882 from the Pocahontas mine, nor that it made any sales of "Pocahontas coal" in the year 1883, in the sense that these words are used in as a trade-symbol. Nor is there any satisfactory evidence tending to show that said company adopted and used a trade-mark, or made any effort to establish one, as such, prior to the year 1885. It is true that in the assignment made by the Southwest Virginia Improvement Company to the complainants, it is recited that said company "did adopt on or about the first day of July, 1882, as a trade-mark the word-symbol 'Pocahontas,'" but surely that statement in such a paper, made under the date of April 1, 1885, cannot be considered as proving that fact, and the record has been searched in vain for testimony establishing it.

The first coal sent to market, according to the evidence, was in July, 1883, at which date both the town of Pocahontas and the postoffice of the same name had been in existence for a year at least. The claim of complainants, that the town had no existence until January 31, 1884, the date of the act of the Virginia Legislature incorporating it, and that, therefore, it was not known legally, in a geographical sense, prior to such date, is not, in the light of the testimony, and in connection with the important questions herein involved, entitled to the consideration given it by counsel. There can be no doubt but that at the time the first shipment of coal was made by the Southwest Virginia Improvement Company, the town of Pocahontas was in existence, the postoffice had been established, and that the coal itself was sent from the station of that name. The word "Pocahontas" then denoted the locality at which the article in which the company was dealing was mined, as well as the point from which it was

shipped, and it also indicated in business matters the natural product of all that region. It follows, therefore, that it could not then be used as an exclusive trade-mark, and as a matter of fact it was not so employed until some time thereafter. We are impelled to find from the testimony that in the early shipments of coal the word Pocahontas was used, not as a word-symbol or trade-mark, but simply as the name of the town from whence it came, for the purpose only of pointing out the place of production. The coal had not then been used, and it had not produced the wonderful results that it subsequently did; its reputation had not been made, and it had not at that time found its way to the marts of the world, to the furnaces of land and sea. The operators of that section, and their vendees, including complainants' predecessors, had not then been given the opportunity to inspect, grade and purify it, so as to make it typify the high degree of excellence that it now enjoys, and there is no evidence tending to show that selection and inspection were then resorted to, other than is usual in all mines. The first direct evidence bearing on the trade-mark is the application of August 25, 1885, made by Castner & Company (Limited), to register the word "Pocahontas" at the United States Patent Office. Such registered trade-mark is not now relied upon by complainants, why we have not been advised, but likely for reasons connected with the decision of the Supreme Court in the Trade-Mark Cases, 100 U. S., 82. It is, however, worthy of notice that such application was made under the provisions of Sec. 4937, Rev. Stat. of the United States, which require the party so applying to set forth in the statement made by him the length of time, if any, during which the trade-mark had been in use, and that said applicants in their statement so filed used this language: "This trade-mark has been used continuously by said corporation since about January 1, 1885." The word-symbol, or device now claimed by complainants, as a trade-mark, is founded on the rule of the common law, that the person or company first employing it to distinguish the goods made or sold by the owner thereof, is entitled to the benefits arising from its exclusive use. The chancery courts of England and of this country have long recognized this privilege, and have enforced it, if the property right of the claimant thereto has been duly established.

As we see this case, the complainants are not entitled to the exclusive right to use the word "Pocahontas," as descriptive of either the locality or character of the coal mined in the "Pocahontas coal field," but all of the producers of that product in that section have the right to so use it in common with complainants. That word has acquired a generic meaning, and from the evidence before us it is clear that, in the business world, it is used to indicate the place where the coal is produced, and that it does

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not point to either the producer or the vendor of the same. All the mine owners who by their labor succeeded in establishing their industries in that section, have the right to use in their business the geographical word which is the recognized designation of the same, and that points to the product peculiarly indicative of its wealth; and surely it cannot be that any one of them can inhibit all the rest from exercising the privilege, which was the birth-right of the section, and is an advantage common to all who are interested in it. To give to complainants below the exclusive right they claim in their bill would be to ignore the principle that is the foundation of the protection given to trade-symbols and marks.

There remains yet one other allegation of complainants' bill to be considered, and that is the charge that the defendant below, intending to deceive dealers in coal and the public in general, unlawfully offered for sale, and sold, a very inferior article of coal under the name of "Pocahontas;" that purchasers of the same were liable to be and were misled, and were induced to buy it as the superior and selected grade usually sold by the complainants; and that thereby the public was deceived and the reputation of the coal sold by complainants was injured. It is undoubtedly true that complainants, as producers and sellers of coal from the "Pocahontas coal fields," are, with all other producers and mine operators in that region, interested in maintaining the purity and reputation of the natural product of the same, and that they may cause the defendant or any one else to be inhibited and restrained from selling, or offering to sell, an inferior coal from another region as the coal mined in the Pocahontas field. This they can do independent of the question of trade-mark, or of their right to the exclusive use of one.

This allegation that the defendant has been engaged in unfair and fraudulent trade is not supported by the evidence. It has been shown that he was advertising and selling "Pocahontas coal," but the testimony also shows that the coal he so advertised and sold was in fact from the "Pocahontas coal field." It follows that the representations made by him were neither fraudulent nor untrue, and that he had a lawful right to so advertise and sell. It nowhere appears that he ever represented to the public that he was selling the same article sold by complainants, except as their coal was comprehended by the word Pocahontas, which also justly described his own. He sold the product of the Browning mine, which is located adjoining the original mine of the Southwest Virginia Improvement Company, in the town of Pocahontas, the coal from which is now disposed of by the complainants as "Pocahontas coal," and it is proven that both collieries excavate from the same vein. As to the right of the Browning mine, one of the oldest in the field, to sell its product as "Pocahontas coal"

there can be no doubt, and it would be unconscionable to deny it. He also sold from the Indian Ridge mine, which is located within the "Pocahontas coal field," and it is shown that the complainants are now selling the output of the Rolfe and Arlington mines as "Pocahontas coal," both of which adjoin the Indian Ridge mine. The complainants themselves formerly sold the coal from this mine as "Pocahontas coal," and it is really difficult to understand why it becomes another article in the hands of the defendant. It is also set forth in the bill that the coal from the Indian Ridge section does not grade as high as that from other portions of the field, and that it had not been carefully inspected by the defendant before it was sold. But the evidence does not sustain the claim, and it appears that the complainants themselves have endeavored to again secure the right to sell this coal as "Pocahontas coal," since it has been so sold by the defendant, and we cannot believe that they would have made this effort had the grade of the product been inferior, or its inspection careless.

The proof does not show that the appellant has practiced any deception upon the public, or that he has perpetrated any fraud upon the appellees. The appellant advertised and was selling coal obtained from the Browning and Indian Ridge mines, of the "Pocahontas Flat Top Region," and he did not represent it as purchased from the appellees, nor as mined by them. He has represented it as coal from the Pocahontas field, and it was in fact such coal. He has made no false representations, and he has invaded no right to which the appellees can properly assert a claim. There is error in the decree appealed from, and it is reversed, and this cause is remanded to the court below with instructions to dismiss the bill. Reversed.

I do certify that the foregoing is a true copy of the original Opinion filed and now remaining of record in the therein entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the United States Circuit Court of Appeals
(Seal.) for the Fourth Circuit, at Richmond, on this 5th day of May, A. D. 1898.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals.

Extract From Decree:

* * * Appeal from the Circuit Court of the United States for the District of West Virginia.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of West Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, with costs; and this cause is remanded to the Circuit Court of the United States for the District of West Virginia, at Charleston, with instructions to dismiss the bill. * * *

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 231.

W. H. Coffman, Appellant, vs. Samuel Castner, Jr., Henry B. Curran, Appellees.	Appeal from the Circuit Court for the United States for the District of West Virginia.

PETITION FOR REHEARING.

Richard C. Dale, Henry E. Everding, Counsel for Appellees and Petitioners.

Goff, Circuit Judge:

The Court has duly considered this petition for a rehearing, and it is ordered that the mandate issue as heretofore directed. The opinion filed in this cause on the 3rd day of May, 1898, found error in the decree appealed from, not, as stated in the petition for a rehearing, solely because the complainants below had failed to prove material allegations of their bill of complaint, but also because the Court found that the word "Pocahontas" could not be exclusively appropriated by complainants as a "trade-mark," or "word-symbol," for the reason that it was and is a geographical word, in and to which all the people of the section of the country to which it refers have the common right of use in connection with their business in such locality. It follows, therefore, that further proofs relating to the same would be unavailing, and it was for this reason that the Court remanded the cause with instructions that the bill be dismissed. The ruling is adhered to. We are clearly of the opinion, not only that complainants below are not entitled to an injunction, but also that there is no equity in their bill, and that, therefore, it will be a useless expenditure of time and money, and cause fruitless delay, to take the evidence mentioned in the petition for rehearing. The prayer of the petition is refused.

May 19, 1898.

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DECREE DISMISSING BILL.

At a Circuit Court of the United States, for the District of West Virginia, continued and held at Charleston, in said District, on Saturday, the 4th day of June, A. D. 1898, the following order was made and entered of record, to-wit:

Samuel Castner, Jr., and Henry B. Curran, co-partners, trading under the firm name of Castner & Curran, Complainants,
vs.
W. H. Coffman, doing business under the name and style of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company, Defendant.
} In Equity.

This cause having been heard upon appeal in the Circuit Court of Appeals of the United States, for the Fourth Circuit, and said court having issued its mandate filed in this court upon the 30th day of May, 1898, wherein this cause was remanded by that court to this, with instructions to dismiss the bill of complaint.

Now, therefore, in consideration of said mandate, it is hereby ordered, adjudged and decreed that the bill of complaint in this cause be, and the same hereby is, dismissed, with costs to the defendant to be taxed

UNITED STATES OF AMERICA. } ss.
DISTRICT OF WEST VIRGINIA. }

I, L. B. Dellicker, Clerk of the Circuit Court of the United States for the District of West Virginia, do hereby certify that the foregoing is a true copy of a decree entered in the chancery cause of Castner & Curran vs. Coffman, on the 4th day of June, 1898.

In testimony whereof I have hereunto set my hand and the seal of said Court, this 23rd day of June, A. D. 1898, (Seal.) and in the 122nd year of the Independence of the United States of America.

L. B. DELLICKER, Clerk.

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Brf. of Stocking for Respondent.

IN THE

United States Supreme Court.

No. 113.

Filed Nov. 10, 1899.

SAMUEL CASTNER, Jr., and HENRY B. CURRAN, trading under the firm name and style of CASTNER & CURRAN, *Appellants*,

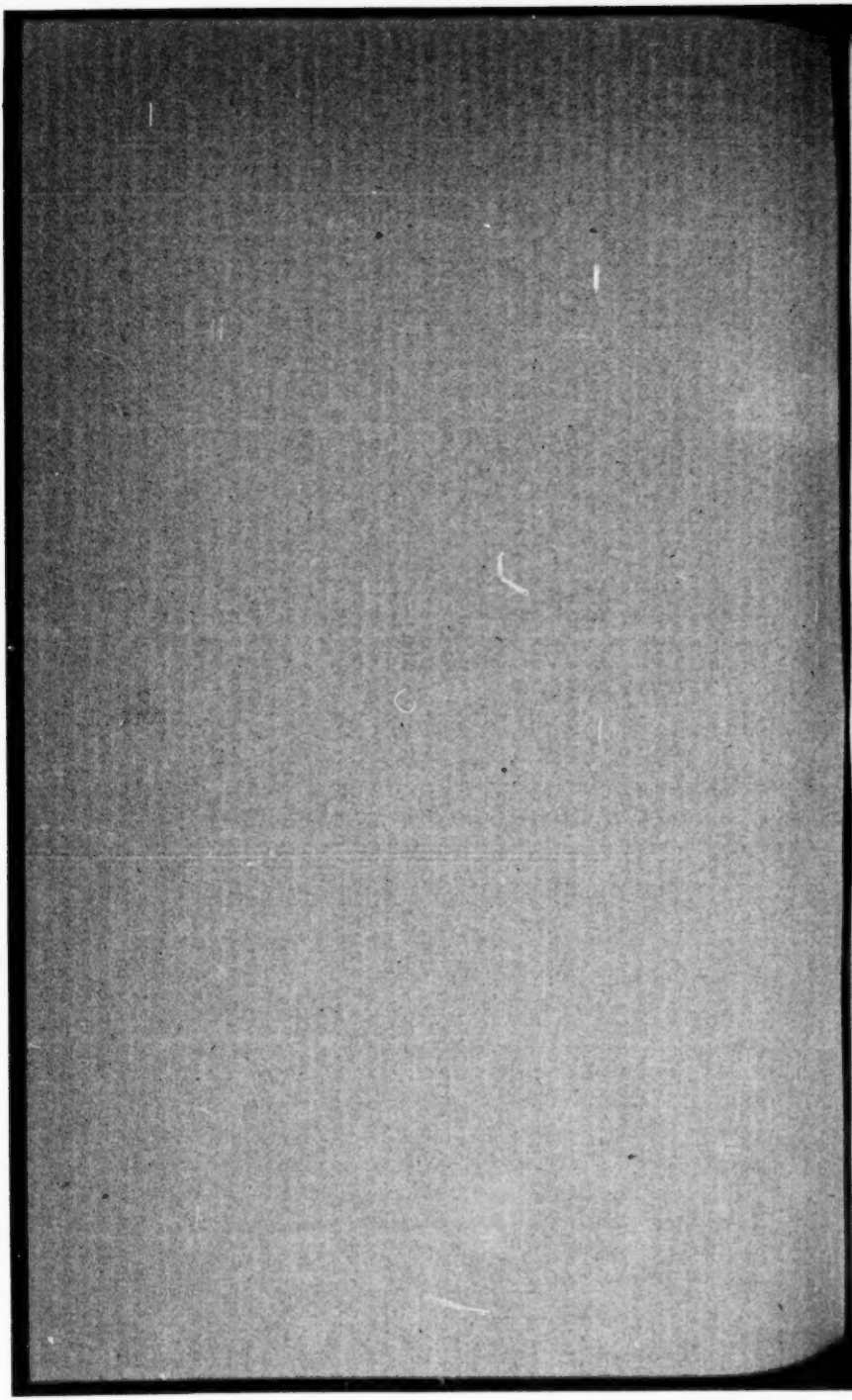
vs.

W. H. COFFMAN, doing business under the name and style of POCAHONTAS COKE AND COAL COMPANY and W. H. COFFMAN COKE COMPANY, *Appellee*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Brief for Coffman, Appellee.

E. B. STOCKING,
Counsel for Coffman.



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IN THE

United States Supreme Court.

SAMUEL CASTNER, Jr., and HENRY B. CURRAN, trading under the firm name and style of CASTNER & CURRAN, *Appellants*,

vs.

W. H. COFFMAN, doing business under the name and style of POCAHONTAS COKE AND COAL COMPANY and W. H. COFFMAN COKE COMPANY, *Appellee*.

No. 113.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR COFFMAN, APPELLEE.

MAY IT PLEASE THE COURT:

This cause involves the right to the exclusive use of the word "Pocahontas" as a trade-mark.

The Circuit Court of Appeals of the Fourth Circuit in Castner & Curran *vs.* Coffman (87 F., 457), Record, page 147, held that "Pocahontas" is a word of well-known geographical signification and that complainants (appellants) are not entitled to the exclusive use of the word "Pocahontas" as descriptive of either the locality or character of the coal

mined in the Pocahontas coal field, but all producers of that product in that section have the right to use it in common with complainants. That the word has acquired a generic meaning, and from the evidence before us it is clear that in the business world it is used to indicate the place where the coal is produced, and that it does not point to either the producer or the vendor of the same.

The Circuit Court of Appeals, First Circuit, in Atwater *et al. vs.* Castner *et al.* (88 F., 642), held that "This (trade-mark or trade-name "Pocahontas") has been used for fully twenty years by the complainants below and their predecessors in title, in a very extensive trade with unbroken public acquiescence. * * * It does not indicate merely that the complainants below are the producers of the coal sold, but quite as much that it is sorted and put on the market under their implied representation of uniform quality and excellence. In addition to the public acquiescence, of which we have spoken, there had been, prior to the injunction appealed from, an adjudication in the Circuit Court in the Fourth Circuit sustaining the claimed trade-mark or trade-name, and enjoining its infringement." And (p. 644) held that "The order was clearly proper when made, and if the circumstances remained unchanged we could not reverse it."

The Honorable Court suggests that the rule laid down in Canal Co. *vs.* Clark (13 Wall, 311) and Mill Co. *vs.* Alcorn (150 U. S., 460) was compellably qualified in Singer Mfg. Co. *vs.* June Mfg. Co. (163 U. S., 169) "as applied to trade-marks and trade-names which have been long and extensively used and have become widely recognized by the public at large, even when they might not have originated in accordance with the ordinary rules of law." * * * "Some of the reasons which render it necessary under some circumstances to protect, at least to a qualified extent, a

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trade-mark of a geographical origin, were given by us in Levy *vs.* Waitt" (61 F., 1008–1012).

"Note by the Court. Mills Co. *vs.* Eagle Co. (86 F., 608), which came to hand since our opinion was passed down, fully sustains our suggestions about trade-names of geographical origin."

The established rule is that a geographical name or the name of a locality cannot be monopolized as a trade-mark or trade-name.

"Lackawanna" Coal case:
Canal Co. *vs.* Clark, 13 Wall, 311 (20–581).

"Columbia" Flour case:
Mill Co. *vs.* Alcorn, 150 U. S., 460 (37–1144).

"Moline" Plow case:
Candee *vs.* Deere, 54 Ills., 439.

"Durham" Tobacco case:
Blackwell *vs.* Wright, 73 N. C., 310.

"Columbia" Paper case:
Morgan Env. Co. *vs.* Walton, 86 F., 605, C. C. A.

"Elgin" Watch cases:
Illinois Watch-case Co. *et al. vs.* Elgin Nat. Watch Co., 94 F., 667, C. C. A.

And many others.

Canal Co. *vs.* Clark has been followed in

Smith *vs.* Reynolds, 10 Blatchf., 105;
McLean *vs.* Fleming, 96 U. S., 254 (24–832);
Amoskeag Mfg. Co. *vs.* Trainer, 101 U. S., 54–60 (60–994–96);
Filkins *vs.* Blackman, 13 Blatchf., 444;
Pepper *vs.* Labrot, 8 F., 40;
Humphreys Specific Homeopathic Medicine Co. *vs.* Wenz, 14 F., 253;
Gray *vs.* Pulley Works, 16 F, 440–441;
Satchelberg *vs.* Ponce, 23 F., 431;
Kinney *vs.* Allen, 1 Hughes, 112;

Burton *vs.* Stratton, 12 F., 700;
Wilcox & G. S. M. Co. *vs.* The Gibbens Frame, 17 F., 625;
A. B. Brewing Assn. *vs.* Piza, 23 Blatchf., 246, and 24 F., 150;
Pratt Mfg. Co. *vs.* Astral Refining Co., 27 F., 494;
And many others.

There are several cases in which protection of a geographical trade-name has been granted as against non-residents, mainly on the ground of deception and unfair competition, but not on the ground that either residents or non-residents have any right to an exclusive use of such a trade-name.

Akron Cement case—Newman *vs.* Alvord, 51 N. Y., 189.
St. Louis Lager Beer case—Anheuser-Busch Bg. Co. *vs.* Piza, 24 F., 149, C. C.
Gage-Downs Co. *vs.* Featherbone Corset Co., 83 F., 213.
Mills Co. *vs.* Eagle, 86 F., 608, C. C. A.
Collinsplatt *et al. vs.* Finlayson *et al.*, 88 F., 693.

The only cases where the name of a locality has been to any material extent affirmed as a trade-name, are those involving a natural product and then only when the producer was the owner of all of the mines, springs or other source of the product.

Genesee Salt Co. *vs.* Burnap, 67 F., 534.
Clinton Metallic Paint Co. *vs.* N. Y. M. P. Co., 50 N. Y., 437.
La Republique Francaise *vs.* Schultz, 57 F., 37, and same parties in 94 F., 500.

That extended use, before or after adoption of the word as the name of a locality, will not confer an exclusive right to the name as a trade-name.

See Canal Co. *vs.* Clark, 13 Wall., 311 (20–581), and Glendon Iron Co. *vs.* Uhler, 75 Pa., 467.

In the former case, a use of "Lackawanna" had existed for forty-two years, and in the latter case "Glendon" had been adopted and used for sometime *before* its adoption as the name of the town. It is not seen how the alleged use of the word "Pocahontas" for 18 or 20 years can confer an exclusive right to its use upon appellants.

Prior and Primary Use of "Pocahontas."

Appellants allege adoption July 1, 1882 (Rec., Exh. B, p. 10), and a first shipment of coal July 30, 1883 (Rec., p 59, Exh. "Collins Receipt"), but on August 25, 1885, Castner and Company, Limited, predecessors of appellants, applied for and secured registration of the word "Pocahontas" as a trade-mark, and in the sworn statement then and for that purpose made, set up that "This trade-mark has been used continuously by said corporation since about January 1, 1885." The post-office of Pocahontas was officially established June 30, 1882 (Rec., pp. 54 and 154). Coal was discovered in Pocahontas in 1873, and development work done in 1881 (Rec., pp. 125 and 135). Further, it is shown (Rec., pp. 100–104) that appellants' predecessors did not use the word "Pocahontas" as a trade-name in 1882 to distinguish their product but used words to distinguish their mines, to wit: "No. 1", "No. 2" and "Baby", so that it is reasonably established that at first, at least prior to January 1, 1885, "Pocahontas" was used by appellants and their predecessors primarily to indicate location and character of coal there mined and not origin or ownership, and therefore no right to that name or word as a trade-name exclusive of the other thirty or more producers of coal from the same locality had been acquired by appellants or their predecessors prior to January 1, 1885, the date set up in their application for registration.

To acquire exclusive use of a trade-name it must be adopted for the *primary* purpose to indicate the *producer* of the commodity. (See Mill Co. *vs.* Alcorn, *supra.*)

Complainants' Right Limited and Used Deceptively.

Even if "Pocahontas" is a legal trade-mark, appellants cannot employ it in connection with another coal than that mined and produced by the Southwest Virginia Improvement Company. Appellants claim the common-law right under an assignment from the originators of the trade-mark (Exh. B., p. 10). This assignment sets up that as the appellants have been appointed the general (not exclusive) factor or agent of, and acquired the entire control and output of, coal mined by said company, which coal has become known as "Pocahontas," and as appellants are desirous of securing also the exclusive right, title and interest in and to said trade name or mark "Pocahontas" for all coal to be hereafter sold by Castner & Curran, therefore, in consideration of five dollars, the company assigns to Castner & Curran "all and whatsoever right, title, interest, and good-will the said corporation, the Southwest Virginia Improvement Company has, or ever had, in and to, by adoption and use, of the word symbol 'Pocahontas' as a trade name or mark for coal; the same to be held and enjoyed absolutely by the said Samuel Castner, Jr., and Henry B. Curran, trading as aforesaid, as Castner & Curran, forever, for their own use or advantage and behoof, and for the use or advantage and behoof of their successors, legal representatives or assigns, as fully and entirely to all intents and purposes at common law or otherwise, as the said corporation, the Southwest Virginia Improvement Company could or might, or would have held the good-will, right, title and interest in the said trade name or mark 'Pocahontas,' hereby conveyed absolutely

unto the said Samuel Castner, Jr., and Henry B. Curran, trading as aforesaid as Castner & Curran, had this assignment and sale of the said good-will and entire right, title and interest in and to the said trade name or mark 'Pocahontas' for coal, not been made."

Even if the company had a lawful right to the trade-mark "Pocahontas," it applied solely to coal mined by the company, and therefore,

1st. Appellants alleged exclusive right applies only to coal mined by the Southwest Virginia Improvement Company.

2nd. The charter of the Southwest Virginia Improvement Company did not authorize them to deal in trade-marks, except possibly as an accompaniment to their mines, plant and good will. Kidd *vs.* Johnson, 101 U. S., 617–620 (25–769). The Fair & Jose Morales & Co., 82 Ms Apa, 499 (Oct. 99).

3rd. The company could not transfer any exclusive right to the trade-mark to be applied to "all coal to be hereinafter sold by Castner & Curran."

4th. Being an assignee, appellants have failed to announce that fact to the public, in connection with their use of the mark, and could not therefore obtain protection from any court, because they are practicing a deception upon the public in that they (as set up in their bill, Rec., p. 4, Par. X) sell other coals as Pocahontas than that produced by the Southwest Virginia Improvement Company.

Manhattan Medicine Co. *vs.* Wood, 108 U S., 218.
Satchelberg *vs.* Ponce, 23 F., 430, and 128 U. S., 686–691.

Words Indicating Quality.

Primarily "Pocahontas" indicates only two things. First, a locality where certain mines exist; and, second, the quality, class or grade of coal mined at that locality.

Neither of these functions of the word can be lawfully monopolized in this country as a trade-mark or trade-name, because a trade-mark or trade-name must indicate either directly or by association, origin (personal) or ownership, that is, *who* is the producer of the commodity and distinguish that producer from other producers of the same commodity in the same locality. (Canal Co. *vs.* Clark, *ubi supra*, and Amoskeag Mfg. Co. *vs.* Trainer, 101 U. S., 51 (25–993).)

In France it has been held that a trade-mark "ought to consist essentially in a term which is other than the general, common, usual or scientific (*vulgaire, commune, usuelle ou scientifique*) designation of the product." (Versailles, January 6, 1897, cited in Annuaire Farjas, 1899, page 403. Foreign Patent and Trade-mark Laws, page 136—Greeley.)

In England the same rule seems to hold. In Reddaway *vs.* Banham, 1 Q. B., 286, it was held that one manufacturer can call his goods by the name which said goods of another manufacturer has acquired in the market if the name consists only of words of description which are a correct description of the goods. The mark in this case was "Camels Hair Belting." This decision was rendered in 1896, Eng. Appl. Cases, 199, thus giving protection to words indicating quality. But see the more recent case of The Cellular Clothing Co. *vs.* Maxton & Murray, decided April, 1899, in the House of Lords and reported in full in The Trade Mark Record (N. Y.), August and September, 1899, pages 192 and 211, respectively. In this case a trader in 1886 made a new weave of a fabric generically known as "gauze" and selected for this weave the name "cellular," and it seems clear from the comments on the "Camels Hair Belting" case that it turned on the question of intentional fraudulent deception. In the "Cellular" case protection was denied.

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English precedents should be carefully considered as the "Three Mark Rule" permits different persons in the same trade up to the number of three, but not more, to register identical marks. (Greeley, *supra*, p. 133.)

Secondary Meaning.

Can extended use of any geographical name give it a secondary meaning, so that it will point to the producer of the commodity? The answer to this question must, it is thought, depend largely upon the nature of the commodity to which the trade-name is applied. If the commodity be the product of the hand of man, *perhaps*, yes; but if the commodity be the product of nature, no. Coal is a natural product; nature gives it its distinguishing characteristics, and these differ principally in relation to each other as the localities of the mines differ, mines in one locality producing coal of similar character, grade and quality. In the case at bar, Pocahontas coal possesses such chemical and structural features as to have caused it to be the best steam-making coal produced in this country, so much so that it has supplanted the prior use of Swedish coal in sea-going vessels both public and private. These characteristics of Pocahontas coal are not the product, nor the result, of the work of the hand of man in mining, cleaning, grading or sizing the same. Even if appellants have acquired a higher reputation than any one else could possibly attain in the performance of this manual work upon the raw product, they must employ a trade-name which points to themselves as the producers, so as to distinguish themselves from other producers in the same locality of the same natural product.

Singer Mfg. Co. *vs.* June Mfg. Co. is referred to by the honorable Court in the first circuit as an instance where the rule that a word indicating quality cannot be protected as

a trade-mark was necessarily qualified, and stating that there is ground for maintaining that the same necessity exists in trade-marks which represent well-known localities, and citing Levy *vs.* Waitt, 61 F., 1008–1012, as giving some of the reasons rendering necessary, under some circumstances, to a qualified extent, the protection of a trade-mark of geographical origin. The Court also notes Mills Co. *vs.* Eagle, 86 F., 608.

In these cases the commodities were a sewing machine, cigars and flour, respectively, none of them being natural products. In the Singer case it was found that the name "Singer" had acquired a descriptive function indicating a particular make of sewing machine, but that this function reverted to the public at the expiration of the patents under which it had been manufactured. This case certainly does not show any necessity for protecting one party in the use of a name of locality as a trade-name for a natural product of that locality, which all other parties have a right to produce there and sell.

In Levy *vs.* Waitt the court found that "Blackstone" was the name of a street, a river, a canal and a town in Massachusetts, but found it not necessary to decide whether the use of the word "Blackstone" as a trade-mark for cigars rendered the mark illegal.

In Mills Co. *vs.* Eagle, 86 F., 608, the geographical name was protected for resident manufacturers as against a non-resident vendor of inferior flour on the ground that the question was simply one of unfair competition in which exclusive right to any mark was not essential.

As there are exceptions to the rule prohibiting the protection of trade-marks consisting of geographical names, as in cases where unfair competition or fraud upon the public results, so also there *may be* exceptions to the rule against the use of words expressive of quality.

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In one case the trade-mark or name was not geographical but purely fanciful and did not of itself indicate quality and had a primary object to indicate skill. La Favorita Flour, Mendenez *vs.* Holt, 128 U. S., 514–520 (32–526). See Lawrence Mfg. Co. *vs.* Tenn. Mfg. Co., 138 U. S., 537–552 (34–1004).

All of these conditions are reversed in the trade-name "Pocahontas." The primary object of its adoption by appellants' predecessors was not to show any skillful selection but merely locality and the character of a local product, their coal being originally known as from "Mine No. 1," "Mine No. 2," or "The Baby" mine at Pocahontas, this word being well known in the Virginias from its historical significance and therefore not fanciful, and finally clearly indicating a certain quality of coal.

If it be possible for a trade-mark lawfully to acquire a secondary meaning, it must be because of a meritorious quality of the article which has become known by extended sales to the public, but such quality must not and can not lawfully be indicated by a trade-mark.

Take the Singer case; the public were indifferent as to *who* made that machine; what they wanted was the Singer machine by whomsoever made. It was the fact that, at that time, it was a better machine than most any other. Note this in proof; just as soon as the patent expired, Singer machines made by several other manufacturers had large sales. The people were anxious to reap the fruits of the reversion to them of the right to manufacture that machine and cared not one whit who made them.

Take Waltham watches, Am. W. W. Co. *vs.* Sandman, 96 F., 330. It is too late in the day of American Mechanical Achievements to say that any firm cannot make as good watches as another. So that if Waltham watches have merit, it results from the skill acquired by long experience

and possessed by mechanics centered in Waltham, and open to the services of any manufacturer located there. Can one firm monopolize this reputation? The people care not whether their Waltham watches are manufactured by Smith or by Jones so long as they are made in Waltham. When we give to an unlawful trade-mark a secondary meaning, it does not make it lawful, especially when that meaning is one prohibited as a function of a trade-mark. But this case also turned on the point of unfair competition and fraud. This idea of secondary meaning is one to be applied only in cases where in its essential features a trade-mark is lawful. Extent of use does not excuse a mistake in selecting a descriptive word or a geographical name as a trade-mark, and where these defects exist, it would seem that the rights of the public at large are better protected by refraining from imparting to a trade-name of doubtful validity any secondary meaning which would put upon a majority of producers the onus of distinguishing their products from those of a single producer in the same market.

Certainly there is yet to be found a case where the name of a locality has been sustained as a trade-mark for a natural product of that locality unless and only where the producer owned all the mines, springs or other source of that product in that locality or where used by a non-resident, causing unfair competition. The latter instance was fully illustrated in Mills Co. *vs.* Eagle, 86 F., 608, noted by the court in the First Circuit.

To hold that an extended use of a geographical trade-name may give it a function of indicating a producer of an article or product free to be produced by any one, is subject to grave objection as it encourages mischievous monopoly. It is only necessary for a manufacturer or producer to begin now to use such a trade-name, and to refrain from contesting an exclusive right thereto for a series of years and then submit the case.

As to Unfair Competition.

There is positively no evidence of record showing any fraud on the part of defendant, as even the witnesses in behalf of the complainants, who, it will be noted, are not prominent dealers, but evidently small consumers in obscure portions of Virginia and West Virginia, do not swear that the defendant ever sold ~~their~~ his coal as the product of the plaintiff. Of course the coal was sold, as claimed by several witnesses, as Pocahontas coal and as equal in quality to the coal of complainants, which defendant has a perfect right to do in fair business competition, in view of the established fact that the coal sold by defendant is from the *same vein*, and in several cases from mines the entire product of which *was previously sold by the complainants.* (See affidavit of W. Kilpatrick, page 129, wherein complainants have attempted to re-secure the product of the Indian Ridge Mine from which defendant is selling coal.) The affidavit of E. H. Matson, page 34, claims that the coal was sold upon the assumption that it was Pocahontas coal. Defendant's coal was undoubtedly Pocahontas coal and from the evidence of this witness must have been of sufficiently good quality to have materially decreased the sale of complainants' coal. There is no fraud established by these witnesses but instead an honest statement of the origin and character of the coal. Likewise the affidavit of complainants' shipping agent positively fails to establish any fraud and only claims the sale of inferior coal under the name of Pocahontas. This affiant says there is a certain inspection of the coal by which complainants' product is alleged to be in a superior condition, so that the alleged trade-mark Pocahontas must clearly indicate coal from which the impurities have been removed by the usual method. Defendant however shows by the affidavits (pages 124, 125 and 127) that there is a thorough

inspection of his coal. The affidavit of A. S. Hurst (p. 37) seems purely to relate to the inspection or assorting of the coal and he is also an employee of the complainants, who simply refers to one mine with which he has not been connected since November 1, 1896. The affidavit of Thomas Q. Wilcox (p. 38), who is also an employee of complainants, merely relates to their inspection and may be set aside in view of the careful consideration given the subject of fraud and inspection by Judge Goff (record, pages 156 and 157) in his exhaustive decision.

The complainants have attempted to show fraud and deception by the affidavit of L. D. Calfee (p. 40) who purchased coal from defendant believing it to be complainants' coal, but he actually purchased Pocahontas coal. So there was no fraud or deception. The unsatisfactory quality of the coal may have been largely dependent upon the uses to which affiant put it, as he is apparently a small consumer or retail dealer and not a general user of steam coal nor competent to point out any difference in quality between complainants' and defendant's coals. (See Comparative Analysis Table (pp. 118-121) showing defendant's coal as good as and in some cases better than complainants'.) The most that can be said of the affidavit of N. A. Sayers (p. 41) is that he believed the coal to be similar to that sold by complainants. It was undoubtedly from the same vein and must have been similar, but as an intelligent man he certainly knew that he was not purchasing the coal from complainants. Again this affiant does not point out why the coal was inferior in quality to the product of complainants. Attention is also directed to the affidavit of John M. Stockman (p. 42), who merely states that the coal was represented to be of the same character and quality as that of complainants. Defendant's record establishes this to be true, but this affiant is not willing

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to swear that the coal was not equal in quality to that of complainants. He states that he purchased the coal, "fully believing the same was equal in quality" to complainants', and he does not and probably would not state that it was not equal. The affidavit of Charles E. Wales (p. 43) shows no fraud or deception, as the coal dealt in was similar in character and quality to complainants' coal, and produced from the same vein and actually from the same mines from which some of complainants' coal has been shipped. Fred W. Barney (p. 45) is complainants' agent, and his affidavit largely deals with the question of business competition, and he as an interested party undoubtedly believed the word "Pocahontas" to indicate the coal shipped by complainants, but his knowledge did not seem to comprehend that while complainants dealt in Pocahontas coal, there were other parties who dealt in the same coal and had an equal right to designate it as Pocahontas coal.

Horace M. Claxton, who is also an agent for complainants, submits an affidavit (p. 46) in which he attempts to establish complainants' exclusive right to the word "Pocahontas," and such testimony is not surprising in view of his interest in the case, but he does not set forth any deception or fraud. Complainants also place of record the affidavits of George D. Atkins (p. 48) and Henry R. Mather, both agents, interested in the sale of their coal, who make affidavits attempting to establish their principals' right, but they do not cite a single instance of unfair competition or misrepresentation. The parties were employed for the specific purpose of making the affidavits presented by them, and it is but reasonable to presume that they complied with the request of their principals. The affidavits have no material effect upon the case, as they simply make assertions without any specific instances of misrepresentation on the part of the defendant.

If the several affidavits before mentioned are considered in connection with the fact that Pocahontas could not be appropriated as an exclusive trade-name, there are no allegations against defendant, particularly in view of the fact that on pages 121 to 124 of the record defendant presents recommendations from purely disinterested parties as to the character of his coal, which surely should set aside the opinions of complainants' agents that the coal was not of the same quality as that shipped by their principals. In view of the recommendation of Taylor Bros. (p. 122), defendant's coal is deemed preferable to that of complainants. In connection with complainants' affidavits, attention is also called to that of Frederick J. Kimball, who substantiates defendant's claim that the settlement and post-office were known as Pocahontas as early as the middle of 1882, before a railroad was completed or any coal shipped. It is probable that his statement is true, that the town of Pocahontas was created by the efforts to mine the coal there, and that the Southwest Virginia Improvement Company called the town and post-office Pocahontas, but his affidavit does not establish any claim to the exclusive use of this word, and under the decision in the Glendon Iron Works before cited, they gave to all parties doing business in this locality an equal right with themselves to the use of the name by which the natural products have become identified. It also seems from complainants' sworn statement in connection with their trade-mark that they did not use the term as a trade-mark until January 1, 1885. It would therefore seem that prior to this time they did not assert nor claim any exclusive right to the use of this term, and it is difficult to see how at a later date they could adopt a geographical name as their trade-mark. In doing so they have assumed a weighty burden of proof to establish, not only priority of the adoption of the word "Pocahontas," but that by their exclusive

use of the word it has acquired a secondary meaning, to-wit: "Castner & Curran" of Philadelphia, Pa., and furthermore, that the word "Pocahontas" has not acquired with the public the generally-accepted meaning of locality.

In law a trade-mark is a means of indicating producership. As an actual fact, a trade-mark is a substitute for the name and address of a producer, a sort of a commercial shorthand character. Does "Pocahontas" mean a certain locality or does it mean Castner & Curran?

Nor is this all. Complainants charge fraud and hence is added to their burden the presentation of satisfactory evidence of fraud and of unfair competition. As stated by the Chief Justice in the LL Cotton Sheeting case, "the deceitful representation or perfidious dealing must be made out or clearly inferred from the circumstances." (Lawrence Mfg. Co. *vs.* Tenn. Mfg. Co., *ubi supra.*) The *onus probandi* is upon the complainants to distinctly prove the fraud they allege; if not, relief cannot be had even if the party charged has not been *perfectly* clear in his dealings.

It will be found however that the defendant below has in no case represented his coal as that of complainants. Appellants rely upon two circular postal cards issued by Coffman (pp. 30–31). The statements in these cards are absolutely truthful and proper. In one he says, "for steam purposes it has no equal. All mines now producing in the Pocahontas Flat Top District are working the same vein of coal." There is not one word of reference to coal inspected by Castner & Curran. Coffman denies the fraud alleged in the bill, and also that he has in any manner simulated the trade of Castner & Curran. The record establishes the fact that he sells the very same coal that Castner & Curran sell; he sells the Browning mine's coal, a near neighbor to the Southwest Improvement Company's mines and located

in the town of Pocahontas. He also sells coal from the Indian Ridge Mines, the product of which was sold by appellants as Pocahontas coal prior to November 1, 1896 (p. 128).

Inspection.

Appellants would lead the Court to believe that they changed the character and quality of the coal by screening and inspection. The affidavit of C. Botsford (p. 126) states that he is and has been general manager of the Indian Ridge Coal and Coke Company ever since their mines were opened and that their coal is thoroughly inspected since they have been shipping through the defendant. Further than this, the engineer at the Flat Top Coal Land Association has given his complete approval as to the manner in which this property has been operated, and this fact is an additional safeguard of inspection.

Mr. Kilpatrick, the president of the Indian Ridge Coal and Coke Company, swears (p. 128) that the mines of his company are within the Pocahontas Coal Field and that the coal is of a superior quality and used for the best purposes. He also states that the inspection is as thoroughly rigid as when sold to Castner & Curran, and particular attention is called to the important fact that "Castner & Curran" have made an effort to get the Indian Ridge Coal and Coke Company's coal to sell since W. H. Coffman has been selling said company's coal, and even at that late date they made no mention of said company's coal being of an *inferior quality*. The affidavit of Justus Collins (p. 124) sets forth that he is a part owner in mines located in the Pocahontas Coal Region of West Virginia, known as the Louisville Coal and Coke Company and the Greenbrier Coal and Coke Company. His affidavit establishes that *before complainants entered the field*, there was a thorough inspection of the coal and that no change

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has been made in the grading or verification of the product by their inspection. From the following quotation it will be seen that affiant contradicts the complainants concerning the men who performed the work of inspection:

"That the operators in the field furnished the men, who performed the work of inspection; that these men are common laborers, as well as the sub-inspector who acts as foreman at each tipple in the Pocahontas District, and are carried on the pay-rolls of the several companies themselves, with the exception of the foreman and chief inspector. In addition to that, a charge is made on all coal operated by Castner & Curran of about one cent per ton to cover the cost of inspection."

The importance of this statement will be appreciated.

The only witness who attempts to allege that he was deceived in purchasing coal from Coffman is M. A. Sayers (Rec., p. 41), and his statement is very doubtful, as he says, "that in subsequent correspondence with W. H. Coffman, of said Pocahontas Coal and Coke Company, the said Coffman represented the coal of said company to be the same as that being placed upon the market or offered by said Castner & Curran, upon which representation this deponent purchased from said Pocahontas Coal and Coke Company about 80 or 100 tons of such coal, fully believing the same was the Pocahontas coal of Castner & Curran." Sayers had been handling complainants' coal, probably as agent, and he bases his belief in an argumentative manner, from the fact that defendant was selling Pocahontas coal from the same field and vein as that of complainants. He does not swear that Coffman represented that the coal sold by him had been selected, screened, cleaned, graded or inspected by Castner & Curran, and having purchased from those parties before, certainly knew he was not dealing with them.

Resume.

The law and authorities urged and the facts developed in the record seem to warrant an unquestionable acceptance of the following propositions:

1st. A geographical name cannot be appropriated as a trade-name, nor can protection in such use thereof be granted except (*a*) as against a non-resident practicing unfair competition, or (*b*) where the entire source of a natural product is the property of the user of such ~~monopoly~~ *trade-name*.

2nd. Use *per se* however extended cannot confer an exclusive right to such a trade-name and this whether prior or subsequent to its adoption as the name of a locality.

3rd. If such a name can acquire a secondary meaning indicating quality, it can only include natural qualities of a natural product of the locality so named, and *contra*, any quality possibly indicated by a geographical trade-name applied to a natural product cannot be such as to point out an individual producer from a number of producers in the same general field.

4th. If a trade-mark or trade-name be assignable in gross (*i. e.*, separate from the good will and the manufacture or production of the article to which it is applied), its application in the hands of the assignee is restricted to the article and manufacture of the assignor, and such restriction must be indicated in connection with its use by the assignee. Any other use would be deceptive.

5th. Pocahontas acquired in 1882 a geographical meaning, to wit, a locality in Virginia.

6th. "Pocahontas" in connection with the word "Coal" has acquired a well-defined meaning in the public mind, to wit:—coal mined in Pocahontas Coal Field at and about Pocahontas, Virginia.

7th. "Pocahontas" Coal has also acquired the well known meaning of a smokeless, semibituminous steam-making coal

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produced in the Pocahontas Coal Field of Virginia, regardless of the individuality of its producer or seller.

8th. The use of Pocahontas in connection with coal produced in the Pocahontas Coal Field is open to each and all producers of such coal.

9th. The essential test of fraud and of unfair competition is representing one's product as the product of another.

10th. Fraud and unfair competition must be clearly established. They cannot be assumed.

11th. Appellee, defendant below, has not been guilty of selling his coal as coal inspected by Castner & Curran, or of fraud, or of unfair competition.

12th. Appellants have no exclusive right to the word "Pocahontas" as a trade-name, either alone, or in connection with the word "Coal."

13th. Appellants have no title to the trade-name "Pocahontas" either alone or in connection with the word "Coal."

15th. Pocahontas was primarily used by the predecessors of appellant to indicate the locality of their "No. 1," "No. 2," and "Baby" mines.

16th. If the coal produced at the Indian Ridge Co.'s mine was, when sold by appellants, Pocahontas Coal, the same coal sold by appellee is "Pocahontas Coal."

In conclusion, it is urgently submitted that appellants, ten years after the establishment of the rule relating to geographical names in Canal Co. *vs.* Clark, having adopted, as they alleged, "Pocahontas" as a trade-name, have not shown any peculiar, pressing or satisfactory grounds for an exception to that rule. On the contrary, it is fair to presume that "No. 1," "No. 2," and "Baby" were the actual trade-names adopted by appellants' predecessors, and that the primary purpose of "Pocahontas" was to indicate local-

ity and quality, both of which functions of the word were and certainly now, by long use, are free to all producers of coal in the Pocahontas Coal Field.

It is also urgently submitted that as appellants have utterly failed to show that appellee, defendant, has, in a single instance, represented his coal as coal cleaned, screened, graded or inspected by appellants, actual fraud is not established.

Finally, unfair competition has not been shown in any of defendants dealings with the public. He has truthfully described his coal as Pocahontas coal, and as having all the good qualities of that coal, and no circumstances simulative, deceptive or otherwise exist in the record which can possibly give ground for *presuming* unfair competition.

Respectfully submitted,

E. B. STOCKING,
Counsel for Coffman.

WASHINGTON, D. C.

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Office Supreme Court U. S.
FILED
JAN 19 1900
JAMES H. McKENNEY
Clerk.

No. 113.

Brf. (arg.) of Stocking for Coffman

IN THE

United States Supreme Court.

No. 113.

Filed Jan. 19, 1900.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, trading under the firm name and style of CASTNER & CURRAN, *Appellants*,

vs.

W. H. COFFMAN, doing business under the name and style of POCAHONTAS COKE AND COAL COMPANY and W. H. COFFMAN COKE COMPANY, *Appellee.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Argument for Coffman, Appellee.

E. B. STOCKING,
Counsel for Coffman.

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IN THE

United States Supreme Court.

SAMUEL CASTNER, JR., and HENRY B. CURRAN, trading under the firm name and style of CASTNER & CURRAN, *Appellants*,	
vs.	No. 113.
W. H. COFFMAN, doing business under the name and style of POCAHONTAS COKE AND COAL COMPANY and W. H. COFFMAN COKE COMPANY, *Appellee.*	

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

ARGUMENT FOR COFFMAN, APPELLEE.

MAY IT PLEASE THE COURT:

What is the mark?

The gravamen of the bill, of the entire evidence and of the brief, of the complainant appellant is that the trade mark involved in this cause consists solely of the word "Pocahontas."

To what is the mark applied?

The mark is applied to coal, a natural product. As stated by Judge Goff in the opinion of the court of the 4th circuit:

"An actual survey of the outcrop of this field discloses that about one-third of the territory is barren, and that there are near two hundred and thirteen thousand square acres underlaid with the Pocahontas vein of coal. A moderate estimate gives to each square acre 10,000 tons of marketable coal, or say two billion one hundred and thirty million tons. At the time when this suit was instituted thirty-eight different coal and coke companies were operating in the field, all of them advertising, mining and selling the coal excavated from the Pocahontas vein, and known as the 'Pocahontas Flat Top Coal.' For the manufacture of coke over five thousand ovens had been constructed, and were in use. During the year 1883, ninety-nine thousand eight hundred and seventy-one tons were mined, the output in the following years rapidly increasing, until in 1894, three million eight hundred and eighty-eight thousand and fifty-eight tons were sent to market. For the purpose of illustrating the almost inexhaustible resources of the field, it may be stated that at this rate of production—as shown by the returns for the year 1894—it would require about five hundred and forty-eight years to exhaust the seam now being worked. *And it is as to this entire body of coal that the complainants claim the exclusive right to use the word Pocahontas as descriptive of its origin and quality.*"

Natural Product Trade Marks.

From the nature, characteristics and quality inherent in natural products there arises, from necessity, a positive requirement that the rules of law pertaining to trade marks in general must be more rigidly and somewhat restrictively applied. For this reason the rules and authorities given in cases relating to trade marks for articles of manufacture must be materially modified in their application to a case involving a natural product even if they be at all applicable thereto. Articles of manufacture are entirely the product

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of the hand of man. The question of the material employed in their construction or composition is a minor element and any preference on the part of the public is caused by the work of the manufacturer. The individuality of the producer of an article of manufacture is far more fully and completely embodied therein than is possible in the case of a natural product.

Two dealers in coal enter the same bed or seam and each emerges with a given quantity of the natural product of that bed or seam. At this time these two dealers stand in the market of the world upon a plane of absolute equality and the only medium for the exhibition of the individuality of each of these two dealers is in the matter of eliminating inherent impurities in the natural product. It follows then as an unquestionable fact that the only matter to be indicated by a trade mark on a natural product is inspection of that product. Therefore any word, symbol, sign or mark applied to a natural product which can possibly receive protection in regard to its exclusive use must indicate the individuality of the inspector. It must identify one inspector from another dealing in the same natural product.

In articles of manufacture, the common people are experts to a sufficient degree that by an inspection of the article or of the label thereon, bearing the trade mark, they can determine the individuality of the producer, but in the case of a natural product the experts are practically limited to the inspectors at the mine and the dealers in the product. This and other important reasons lead to the inevitable conclusion that a trade mark applied to a natural product must receive a legal consideration and treatment materially different from a trade mark of an article of manufacture. It follows therefore also that the numerous decisions of the courts in trade mark cases involving articles of manufacture are in a great majority of cases inapplicable to the case at bar.

"Pocahontas" *Per Se* Unobjectionable.

The word "Pocahontas" as a trade mark or as a trade mark for coal is not *per se* objectionable. The complainant has a right to the use of that word in connection with the word "coal" as a trade mark. Defendant and each and every operator in the Pocahontas coal field, also possesses the right to use that word in the same manner and for the same purpose. The objection to the word as an exclusive trade mark is that it was and is the name of the locality where the coal is produced.

The Time and Purpose of Adoption.

This subdivision of this cause requires a statement of the history of the development of the coal industry in the Pocahontas coal field. It is the actual gravamen of the entire record that the word Pocahontas was first adopted as the name of the locality, and that it was so adopted for that purpose before any coal was ever shipped from that locality. Furthermore that a post office was established at that locality and named Pocahontas officially by the Post Office Department of this Government *thirteen months* before any coal was ever shipped from that locality. The consensus of the entire record substantiates the application of the word Pocahontas to the locality long prior to its application to the product of that locality. Complainant's record establishes these facts.

Mr. Kimball, president of the N. & W. Ry., one of the most important and intelligent of complainant's witnesses, states on page 54 explicitly:

"That the mines of said Southwest Virginia Improvement Company were opened and developed early in the year 1882, and before the middle of said year, but coal was not shipped in large quantities until the completion of the

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branch of the Norfolk and Western Railroad Company to the coal field and mine openings, designated the "East" mine and "West" mine, which was in the year 1883; that prior to the building of this branch railroad and opening of the said mines, this section of the country was a wilderness; that deponent remembers the history of these early transactions, because as an officer of said Norfolk and Western Railroad Company he was interested in developing traffic for his railroad from the said mines; *that sometime about the middle of the year 1882, the said Southwest Virginia Improvement Company called their settlement and post office* Pocahontas and *upon the completion of the branch of said road* the station was called 'Pocahontas,' and the coal mined and marketed under the name and style of 'Pocahontas' coal."

This witness makes a second affidavit on page 134, closing with the following sentence:

"*Prior to the opening* of the mines of the Southwest Virginia Improvement Company, coal was not known to exist in any quantity in this region, and being a wilderness, remote from railways, and *without even carriage or wagon roads*, and practically without population, this *section* of country had no distinctive designation."

It is conceded that prior to the *opening* of the mines, which was in the middle of 1882, this *section* of country had no distinctive designation and that it did not have even carriage or wagon roads. Consequently no coal could possibly have been shipped by any means prior to July 30, 1883. (Collins Receipt, p. 59.)

Kimball is corroborated by the history published in "The Iron Belt" of October, 1891, as given on page 99 of the record, which shows that only surface work was done in 1881; that in January, 1882, about 20 miners were landed at the point in Tazewell County where now stands the town of Pocahontas, then a howling wilderness.

"The wet season in the spring of 1882 retarded the progress of the work *which was all out of doors*, but in March, that year the first blast was put into the East mine and on April first, Mr. Thomas C. Blair, now a successful capitalist of Roanoke, Va., closed a contract with the Southwest Virginia Improvement Co. to run the No. 1 east mine one mile, also the air course and the number 1 west mine. The work was then pushed with vigor till fall when it was stopped for a time on account of *the inability of the railroad to reach the mines*, in consequence of all the coal taken from the mine being dumped in front of the opening."

On the contrary, Samuel Castner, Jr., a member of the complainant corporation, deposes under oath, on page 13, as follows: "that *during the year 1882*, the said Southwest Virginia Improvement Company *began* to sell its coal under the purely fanciful and arbitrary name of Pocahontas, and called its mine the Pocahontas mine, and founded a town, which it also called 'Pocahontas.'"

With all due respect to this witness it must be held that his deposition upon this point can have little weight because he, the same Samuel Castner, Jr., when a member of the firm of Castner & Co., Ltd., predecessor of the complainant, positively stated under oath, as an applicant for a registration of the word "Pocahontas" for a trade mark for coal, that said trade mark had been used by his said corporation since about *January 1, 1885* (p. 69 of record) and that (p. 70 of record) at this time—to wit, August 21, 1885—his said corporation "has a right to the use of the trade mark, that *no other person, firm or corporation has the right to such use* either in identical form or in any such near resemblance thereto as might be calculated to deceive." Ten years after this application was made and registration secured, the same Samuel Castner, Jr., a member of complainant corporation, took an alleged title to said mark by

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way of an alleged assignment from the Southwest Virginia Improvement Company, so that this witness for 10 years claimed in his own right the exclusive use of the word Pocahontas as applied to coal and subsequently—to wit, in 1897—he deposes for the information of this Court that the Southwest Virginia Improvement Company *began selling* their coal in *1882* under the purely fanciful and arbitrary name of Pocahontas and called its mine Pocahontas. Kimball above quoted and the "Iron Belt" above quoted show that the mines were known as the No. 1 East Mine and the No. 1 West Mine and the latter exhibit in giving the history of the Southwest Virginia Improvement Company (p. 104 of record) mentions the mines "three in number— 'No. 1 East,' 'No 1 West' and the 'Baby'—are located about one-half mile from the town of Pocahontas, on Laurel Creek."

From the above it is unquestionable that no coal was produced in 1881; that 20 miners was the extent of the force employed in the forepart of 1882; that in the middle of 1882, or, as stated by the Honorable Court in the fourth circuit, on *June 30, 1882*, the postoffice was established as Pocahontas; that in 1882 the mines were known as "No. 1," "No. 2," and "Baby" mine; that the *first blast* was in March, 1882; that prior to that time there were not even wagon roads, and that the railroad was not completed to Pocahontas until *1883*, and that the first coal was shipped *July 30, 1883*. It is to be noted particularly that Mr. Kimball, on behalf of the complainant, states "that the Southwest Virginia Improvement Company named *their settlement* and *postoffice* Pocahontas, but they did *not* name their *mines* "Pocahontas." It is therefore established fact that the word "Pocahontas" was *dedicated to the public* as a geographical name, and the Southwest Virginia Improvement Company could not thereafter recall such dedication and readopt the

word as a trade mark for coal. *The word Pocahontas was and is the name of a locality.* To-day Pocahontas is a city of 4,000 population ; to-day Pocahontas is known the world over as the distinctive name of a peculiar and distinctive quality of steam-making coal, and it is a question whether or not it is possible to give the word at this day and date any other significance than that of a locality and of a natural product of that locality.

Complainant's Title to Mark.

The first instance, in order of time, of a claim of the complainant to the exclusive use of the mark was 1885, when their predecessors, Castner & Co., Ltd., applied for a registration of the mark. The next instance, in order of time, of such a claim was in 1895, *ten years after* applying for the registration. This claim is by way of assignment from the Southwest Virginia Improvement Company (Exh. B., p. 10 of record.)

This assignment is null and void—

(*a*) Because the word had already been dedicated by the company to the public as the name of a locality.

(*b*) Because its use as a trade mark by others than the company would be deceptive, as it can in connection with the coal to which it is applied indicate nothing more than inspection of that coal. In addition to this the assignment pretends to carry the mark and apply it to *any and all coal* sold by the complainant.

(*c*) The mark has been thus deceptively employed by the complainant (see bill of complaint), and that without notifying the public that they are the successors, so far as the trade mark is concerned, of the Southwest Virginia Improvement Company.

(*d*) There has not been such an exclusive use of the mark by either the Southwest Virginia Improvement Company or

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the complainant or their immediate predecessor as would confer upon them an exclusive use thereof, because from 1885 to 1895 the mark was *simultaneously* used by the complainant and its immediate predecessor and by the Southwest Virginia Improvement Company, and from 1894 to the present time there have been at least ten other users of the mark in connection with the same coal (see letter heads, Rec., p. 112.)

It clearly appears from the above that in neither line of title is there the foundation of any right in the complainant to the exclusive use of the word Pocahontas as a trade mark for coal produced in the Pocahontas Flat Top Coal Field.

It also follows from the above that the Honorable Court in the first circuit, which laid such stress and importance upon the alleged fact of 20 years' continuous exclusive use of the mark by complainant, was misled in a very material matter, but even if the complainant had exclusively employed the word "Pocahontas" as a mark, continuance of use cannot confer validity upon an illegal and improper trade mark. Even if the Southwest Virginia Improvement Company did first apply the word to their mines and their coal before it was applied to the locality as the name thereof, this can give them no exclusive title to its use for a natural product of that locality. This question was fully and clearly determined in the case of the Glendon Iron Co., where the word was actually first employed as an arbitrary trade mark and afterwards became the name of the locality, while in the Lackawanna case the name of the locality had been used as a mark for over 40 years.

It is fair to conclude at this point of the argument that a permanently settled rule of law, that the name of a locality shall not be monopolized by one individual firm or corporation as a trade mark for products of that locality, would require, in any case asking for a modification of that

rule, the most convincing proof of a certain, positive and *wholly satisfactory reason* for requesting such a modification. The burden of proof of *that character* is upon the complainant, while the evidence shows clearly a prior adoption and application of the alleged mark as the name of a locality and the title to the mark set up by the complainant has a cloud on it, so that it is fair to say that in neither of these matters is there presented to the Court a sufficient reason for making an exception to the rule.

Inspection.

Appellant alleges immense expense in establishing and carrying on a rigid system of inspection whereby their coal has been made far superior to that of any other producer in the same field (p. 31). What are the facts?

The facts are that a selfish interest alone would compel each individual operator to inspect his raw product so as to bring it up to a marketable standard and condition. It is natural to assume that all of the 38 or more operators in the Pocahontas coal field are controlled by this motive. Before Castner & Curran entered the field—

"about April 1st, 1895, coal in the Pocahontas field had been inspected, and since Mess. Castner & Curran have undertaken to regulate that inspection, in April, 1895, there has been no change either in the grading or verification of the product. That the operators in the field furnish the men who perform the work of inspection; that these men are common laborers, as well as the sub-inspector, who acts as foreman at each tipple in the Pocahontas district, and are carried on the payrolls of the several companies themselves, with the exception of the foreman and chief inspector. In addition to that, a charge is made on all coal operators by Castner & Curran of about 1 cent per ton to cover the cost of inspection." (Collins, p. 125.)

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Regardless of the fact as to who established this system of inspection, which fact is immaterial, it is clear from the above quotation from the record that the system consists in the provision of helpers or laborers, four in number more or less as is required at each tipple, which laborers are under a foreman and each foreman is under a chief inspector. The helpers are provided, and paid for, by the mining companies whose coal they inspect, and they represent their companies to see that no good coal is thrown out. On the other hand these helpers are under the supervision of the foremen to see that not more than 60 per cent. slack or fine coal and not less than 40 per cent. of lump coal is loaded at the tipple into the car. Furthermore the foreman is under the supervision of the chief inspector, who goes from tipple to tipple throughout the field to see that the foremen perform their duties. While the helpers are selected by the mining companies, the foremen and chief inspector are selected by Castner & Curran and the companies pay one cent per ton to Castner & Curran. Now, Mr. Curran testifies on page 15 that they sell about three million tons yearly. One cent per ton amounts to $30,000. Allowing 150 persons for the work at the usually low rates paid therefor in mining sections, a fair estimate will make the expense approximate $25,000, leaving a net profit to Castner & Curran of $5,000 per year on their alleged expensive system of inspection alone, and in addition to the 15 cents per ton allowed them as commission as sales agent.

By referring to the deposition of Mr. Botsford (p. 126), General Manager of the Indian Ridge Coal and Coke Company, the product of whose mines the defendant sells, which product previous to November 1, 1896, was sold by complainant as Pocahontas coal, and to the deposition of Mr. Kilpatrick, president of the same company (p. 128 of record), it will be found that the system of inspection of the coal since

defendant has been selling the same is identical with the system which existed when complainant sold the coal, with the exception that the foreman who formerly worked for Castner & Curran was employed during the time that defendant sold the coal for a period of about two months, when he was discharged, and subsequently appears as a witness for the complainant and deposes that the coal sold by defendant is very inferior in quality (Wilcox, p. 39). It will be found from the deposition of Mr. Botsford that the mining of the coal is carried on now as it always has been, and so far as known has met the complete approbation of the Engineer of the Flat Top Coal Land Association, whose duty it is to see that the different operators mine their coal properly and in accordance with the terms of their leases. It is fair to assume that those terms require proper mining and proper inspection.

It is fair to conclude from the argument as thus far advanced that neither the purpose of the *primary* adoption of the alleged trade mark "Pocahontas," nor the title to the exclusive right to the use of said mark in the complainant, nor the exclusiveness of such use of such mark, nor the alleged expensive system of inspection have been established either collectively or singly to such an extent as to warrant or require a modification of a rule of law so well established as is the rule prohibiting the exclusive appropriation of the name of a locality as a trade mark applied to a natural product of that locality.

The solidity of the foundation and the clearness of the outline of the rule prohibiting monopoly in a geographical name as a trade mark are so fixed in the mind of the commercial world that it stands as a beacon light observed by all, and it is most respectfully and urgently pressed to the attention of the Court that there is insufficiency of reason disclosed in the complainant's case for changing either the

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foundation or the outline of that standard regulation of the relative rights of competitors in the commercial field.

Unfair Competition.

An essential division of the case at bar is the question of whether or not the complainant has made out a case of unfair competition. It is recognized that the gist, the essential element, of unfair competition is the selling of one's goods for those of another. As before stated, the trade mark in this case is applied to a natural product and in the very nature of the product to which it is applied it, the trade mark, can have reference only to the matter of inspection. Regardless now of the question of the validity or invalidity of the mark itself, which is not an essential matter in a charge of unfair competition, it must be *shown* that the defendant, appellee, has offered his goods with either one of two false representations, to wit: "This is Castner & Curran's coal that I am offering to you," or "this coal that I am offering to you was inspected by Castner & Curran."

One may search the record of this case in vain for a single instance of either of these two false representations. The gravamen of the record and of complainant's brief is that defendant has represented his coal as "*Pocahontas*" coal, and has thereby misled and may mislead the public in believing that it is purchasing Castner & Curran's coal. The quality of coal sold by defendant may be ever so inferior, and so long as he does not represent it to be the complainant's coal or coal inspected by complainant, there is no wrong attending its sale. But the record shows conclusively that defendant's coal is as good and in some instances preferable to that of complainant's. (See commendations, pp. 122 to 124, inclusive.) Reference might be again made to the careful inspection given to the coal, as rehearsed by Botsford (p. 126), and by Kilpatrick

(pp. 128 and 129) and note particularly the fact in the latter deposition that complainant has made an effort to regain the agency of this coal since defendant has been selling it, and even at that late date made no mention of the coal's being of an inferior quality. Note also the character of the witnesses employed by the complainant to establish unfair competition and inferiority of product. They seem, in every instance, to be a sub-sale-agent, an employee of or a party in interest with the complainant in the issue of this cause.

Complainant's and Defendant's Coals the same.

From a reference to the depositions of mining engineers Cope (p. 132), Welsh (p. 125), and Paddock (p. 133), it will be found that the number 3 bed coal, commonly known as the Pocahontas Flat Top Coal, is the only vein or bed which is mined in that field and is the coal sold by Castner & Curran. These being facts appellee has the undoubted right to say he is selling the same coal that Castner & Curran sells, but turn to Exhibits J and K (p. 29), Exhibit I (p. 30) and Exhibit R (p. 42) and learn exactly what the defendant has said to the trade in regard to his coal:

"All mines now producing in the Pocahontas Flat Top district are working the same vein of coal" (p. 30).

"Since November 1st we have been, are now and will continue to sell the Pocahontas coal, which is mined in the Pocahontas Flat Top coal district. These mines have been operated for several years, and it is highly probable that the best Pocahontas coal which Pocahontas consumers have been receiving has been shipped from our mines" (p. 31).

Exhibits O and P (pp. 47 and 48) are emphasized by the appellant. Exhibit O says: "Pocahontas smokeless coal constantly in transit," and "Get the genuine article from yours truly, F. B. Newell & Co., 355 Dearborn St., Ellsworth

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Bldg., Chicago, northwestern distributors." It further says: "When you get Pocahontas smokeless coal you get the best product of the celebrated Flat Top West Virginia district." Exhibit P, issued by the same firm as Exhibit O, reads "Pocahontas Coke and Coal Co.'s celebrated coal constantly in transit."

These extracts from advertising devices fail to show that defendant has represented his coal as Castner & Curran's coal or coal inspected by Castner & Curran. Certainly if the Indian Ridge Company's coal was "Pocahontas" coal when sold by the complainant, it must have been "Pocahontas" coal when subsequently sold by the defendant.

Subsequent Correspondence.

By reference to complainant's record, and particularly to the depositions of Calfee (p. 40), of Sayers (p. 41) and of Stockham (p. 42), it will be noted that each deponent received a postal card (Ex. R., p. 43) which led the deponent to believe that he could buy Pocahontas coal from defendant and that in *subsequent correspondence* Coffman "represented his alleged company's coal as Pocahontas coal" and also "represented the coal of said company to be *the same as that* BEING *placed upon the market or offered by* said Castner & Curran." The statements of these deponents are the strongest that can be found in complainant's record.

WHY HAS NOT THE COMPLAINANT PRODUCED THE "SUBSEQUENT CORRESPONDENCE"? In the advertising device (Exhib. R), which accompanies the deposition of Stockham (pp. 42 and 43), there is the statement that the defendant had recently contracted to take the entire output of a large mine. The date of this device is November 16, 1896. Defendant began selling Indian Ridge Company's coal November 1, 1896, so that the statement of this device may be reasonably assumed to refer to that mine, and in that sense he

could say *truthfully* that the coal which he offered was the same that *had been* offered by Castner and Curran. It will require the production of the subsequent correspondence to show that he said anything stronger than that. As two of these witnesses are selling agents for the appellant and as the subsequent correspondence is not produced, it seems to leave the complainants case without positive proof of misrepresentation. It is not necessary to add that unfair competition cannot be presumed nor assumed; it must be *positively established.*

Secondary Meaning.

CAN A GEOGRAPHICAL TRADE NAME APPLIED TO A NATURAL PRODUCT OF THE LOCALITY INDICATED BY SAID NAME ACQUIRE SUCH A SECONDARY MEANING AS TO IDENTIFY ONE PRODUCER OF THAT PRODUCT AMONG OTHER RIGHTFUL PRODUCERS THEREOF IN THE SAME LOCALITY?

The determination of this interrogatory involves the consideration of the question of law presented in this case. The facts upon which the interrogatory is based and which constitute the cause for making the interrogatory are perhaps best stated by the Honorable Court in the first circuit through Judge Putnam as follows:

"We do not, however, find it necessary to decide at present whether or not any qualification of that nature would be applicable to the case at bar, because so sharp a question does not now arise. Some of the reasons which render it necessary, under some circumstances, to protect, at least to a qualified extent, a trade mark of a geographical origin, was given by us in Levy *vs.* Waitt, 61 Fed. Rep., 1008, 1012."

Then after citing the general rule from Columbia Co. *vs.* Alcorn and an explanation thereof from Canal Co. *vs.* Clark, the Court says:

"It is necessary to recognize carefully the distinction which these expressions imply. Otherwise, a manufacturer, pro-

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ducer, or dealer who furnishes goods of such excellent quality that they build up so extensive a trade as to give a distinctive name to the locality where it is pursued, would be defeated of the just fruits of his industry and integrity by the very fact of his own meritorious conduct. Therefore, even under the rule as stated in the Columbia Mills Company *vs.* Alcorn, *ubi supra*, and without the qualification recognized in Singer Manufacturing Company *vs.* June Manufacturing Company, *ubi supra*, the case at bar as presented to the court below and also to this court, involves a difficult question of fact to the effect whether, at the time the trade mark or trade name in question was adopted the word Pocahontas was in common use as designating a known locality, or whether the locality gained its name from the complainants. Therefore, the Circuit Court was not met with a pure question of law, but with a mixed question of law and fact; and, by the well settled principles touching the granting of temporary injunctions, the court was fully justified in its action by the long and unbroken public acquiescence, without reference to the adjudication in the Fourth Circuit to which we have referred."

It seems then that the facts on which is based a request for the modification of a long established rule of law are—

"a manufacturer, producer or dealer who furnishes goods of such excellent quality that they build up so extensive a trade as to give a distinctive name to the locality where it is pursued, would be defeated of the just fruits of his industry and integrity by the very fact of his own meritorious conduct."—

unless he be permitted to enjoy the exclusive use of the name of that locality as his trade mark. Let it be remembered that even with these facts existing the protection suggested is to be "only to a qualified extent."

Taking the interrogatory in its full meaning and recalling the nature of the product and the name of the locality of its production, it appears to be absolutely true that with

only the name of the locality as a trade mark, there can possibly be nothing else to identify a particular producer or dealer except his name appearing in connection with the trake mark. It must be "Pocahontas—Castner & Curran," or "Pocahontas Coal—W. H. Coffman." There is no cut, illustration or picture used in connection with the name of the locality which would identify the dealer as soon as the trade became conversant with it. There is nothing but the name of the locality and the name of the dealer. Now the question is: *Can there be devised a qualification of the rule which shall make* "POCAHONTAS," *separate from the name of the dealer, identify that dealer?* It seems to be impossible in the very nature of things concerned. Would it be just to try this plan of qualification—all of the dealers other than Castner & Curran shall place upon their letter heads, bill heads and shipping cards "Pocahontas Coal—John Smith, Proprietor—This coal was not inspected by Castner & Curran"? Must all the other dealers give Castner & Curran a left-handed advertisement on their bills, postal cards, advertising devices and car labels?

Take the circumstances formulated by the honorable Court in the first circuit. Take a dealer who furnishes such an excellent quality of goods that they build up so extensive a trade as to give a distinctive name to the locality where it is produced. The facts so far as stated existed in the Glendon Iron Co. case and the exculsive use of the word Glendon was denied. So far no new reason appears for qualifying the rule, but the facts formulated by the Court *are not paralleled in the case at bar.* March 1, 1882, the first blast in Mine No. 1 occurred, and on June 30, 1882, an officially designated and *voluntarily named* post office by the name of Pocahontas was established and the first coal was not shipped until 13 months *thereafter.* The sale of coal of excellent quality had *not* built up *so extensive a trade* as to

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give a distinctive name to the locality. But the dealer would be defeated of the just fruits of his own meritorious conduct. The dealer of the case at bar TEN YEARS after this honorable tribunal had announced the rule, that the name of a locality could not be monopolized as a trade mark, not only boldly seizes upon the name of the locality for a natural product produced there, but boldly seizes it *after* he has *dedicated* it as the name of that locality. Does this constitute *meritorious* conduct? Is the requirement that he shall adhere to his original dedication of that name as the name of the locality defeating him of any of the *just* fruits of his *meritorious* conduct?

It seems to be clearly established that this is not a case requiring a qualification of the rule. If the rule should be qualified by reason of the existence of all and every one of the facts formulated by the honorable court in the first circuit, it would have been qualified in the Glendon Iron Case, but it seems too much to ask this honorable tribunal to weaken the foundation or mar the outline of that brilliant beacon in commercial life set up in Canal Co. *vs.* Clark.

There must be some other motive than the mere exclusive use of this word Pocahontas. What that motive is is fully shown upon the record. It is shown by the proof and pleadings that the complainant is attempting to monopolize the coal trade of that vast section of over 000 square acres, to suppress competition and to force all the collieries of that section to employ them as agents. The second paragraph of Exhibit A, producers' contract (par. 1, p. 17), reads: "The producers shall consign their entire product of coal intended for rail transportation other than that used for coke to the general coal agent," the complainant, while paragraph marked "3" on the same page and of the same contract reads: "Such general tide-water agent shall agree not to sell or deal in bituminous or

semi-bituminous coal other than that transported by and over the line of the railroad company," the Norfolk and Western Railroad. Paragraph (*a*) of the same contract (third paragraph from bottom of page 18 of record) reads: "The railroad company shall receive a sum equal to seventy (70) per cent. for transportation, and shall not hold the producers liable therefor." Paragraph marked "Fourth" on page 19 reads: "The parties hereto agree that during the existence of this contract they will make no sale of coal lands or mining rights or leases for coal operations, except upon the expressed condition that the purchaser, lessee or sub-lessee, shall become a party to this agreement." Paragraph "Fourth" of Exhibit B, Tidewater Coal Contract (p. 23) reads: "Castner & Company, Limited, will not sell or deal in bituminous or semi-bituminious coal other than which shall be transported by and over the line of the railroad company." Similiar restrictions occur in clause three of Exhibit Contract D between complainant and the Pulaski Iron Company.

These references are made for the purpose of showing the correctness of the prophecy of this high tribunal in Canal Co. *vs.* Clark to the effect that to give exclusive right to the use of the name of a locality as a trade name for a product of that locality would lead to mischievous monopolies.

In conclusion it is respectfully submitted that the complainant has no equity in his bill; that the word "Pocahontas" was originally dedicated to the public as the name of the locality where Pocahontas coal is produced; that the mining industry did not give the name to the locality, but on the contrary that the name of the locality was given to the product of that industry; that the title alleged by the complainant is cloudy; that no continuous, unbroken public acquiescence in any exclusive use of that word by the complainant has existed, and that, therefore, the complain-

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ant's allegations of an exclusive right fall to the ground. It is further submitted that no instance of misrepresentation, fraud or unfair competition of any kind whatever has been proven against the defendant appellee. It is also submitted that the facts existing in this case do not call for a qualification of the established rule, and that the bestowal upon these complainants of any right to the use of the word Pocahontas as a trade name for coal in the Pocahontas Flat Top Coal Region must, in the very nature of the facts and conditions involved, be an *exclusive* right to use such word for that purpose, because it cannot be used in a *qualified* manner, when unaccompanied by any cut, illustration or additional mark, sign or symbol.

And finally, any right, exclusive or otherwise, even if a qualified right were possible in the nature of things, granted to the complainant would result in a mischievous monopoly and would put upon a vast majority of one class of people, the producers in that field, the onus of distinguishing each of themselves from this complainant who constitutes but one of the class. In this sense it seems that it would be against public policy and whatever may be the conclusion of this Honorable Court as to this feature, it is submitted that the defendant, appellee, in all of his business transactions has been so exceedingly careful that he has not made any false representations as to the product in which he deals. He has felt and believed, as a majority of the producers there have felt and believed, that he has the right to use the name of his post office, town and section of country, as the public at large all over the world has persistently used that name, to distinguish a particular kind of coal by the name of the locality in which it is produced. All the world over the coal is Pocahontas coal just as other coals are Lehigh Valley, Hocking Valley, Cumberland, Pittston, Connellsville, New River, George's Creek, and that of a hundred other coal producing localities, domestic and foreign.

Dismissal of the Bill.

It is not thought necessary to enter at any length into a consideration of the dismissal of the bill by the Honorable Court in the fourth circuit from an appeal upon an order granting a preliminary injunction. In fact, the cases cited by the complainant show clearly that this is a matter entirely in the discretion of the court. It would seem to be inconceivable that any court could do otherwise after finding, without doubt, that the complainant had no exclusive right in the use of their alleged trade mark and after having before it ample evidence to sustain this finding and the total lack of evidence of unfair competition. If the court had remanded the case for taking further testimony, this would have been not only permitting but directing the continuance of expensive and harassing litigation to the great injury of not only the defendant, appellee, but of other producers who desire to use the same geographical name in connection with the coal which they produce in the locality of that name.

Complainant originally pleaded not only exclusive right to the mark involved and unfair and deceptive competition, but submitted affidavits in support thereof. Having made the plea and presented evidence on both of these two points it seems too late for them now to urge the privilege of virtually reopening the case *ab initio* for the purpose of producing cumulative evidence. Being clear that exclusive right to the mark involved was not established, it would seem to be the better policy to maintain the act of dismissal of the bill performed in the discretion of the Court, as there is nothing to show that that discretion was not properly exercised.

Respectfully submitted,

E. B. STOCKING,

Counsel for Coffman, Appellee.

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IN THE UNITED STATES SUPREME COURT.

No. 113.

CASTNER & CURRAN *vs.* W. H. COFFMAN. } Subject: Trade-Mark "Pocahontas" Coal.

Memorandum of Authorities Referred to by Counsel for Coffman During Oral Argument.

MAY IT PLEASE THE COURT:

At the request of this Honorable Court, through its Honorable Chief Justice, the following memorandum of authorities is presented, as they do not appear in the printed brief or argument submitted, but do appear in the public documents mentioned by the counsel for the defendant in his oral argument at the hearing of this cause:

As showing the existence of an official post office named Pocahontas, in Somerset County, Pa., prior to 1878, see U. S. Official Postal Guide, No. 17, 1878. This also shows that there existed in 1878 five other post offices bearing the name of Pocahontas.

As further showing that at least one of these post offices is in a coal mining section, to wit: Pocahontas, Somerset County, Pa., reference was made to the official records of the U. S. Geological Survey, entitled "Pennsylvania Second Geological Survey—County Geological Maps" (Map 50—Somerset County) and to the records of the department relating thereto.

Respectfully submitted,

E. B. STOCKING,

Counsel for Coffman.

CASTNER *v.* COFFMAN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 113. Argued January 23, 24, 1900. — Decided May 21, 1900.

On the facts as detailed in the opinion of the court, it is *held* that there was no error in the decree of the court below.

THIS suit was commenced on March 12, 1897, in the United States Circuit Court for the District of West Virginia, sitting in equity. On the date mentioned a bill of complaint was filed on behalf of Samuel Castner, junior, and Henry B. Curran, copartners, trading under the firm name of Castner & Curran. The defendant named in the bill was W. H. Coffman, doing business under the name of Pocahontas Coke and Coal Company and W. H. Coffman Coke Company. The relief prayed was substantially that the defendant might be perpetually restrained from using or imitating the name Pocahontas in connection with the selling, advertising or offering for sale, of coal. The relief thus asked for was based upon the averment that the word Pocahontas was a trademark for coal, which trademark was owned by the complainant firm, and besides that the word in question had come in the course of business to designate the coal offered for sale by the complainants, and that the use of the name by the defendant was calculated to deceive the public into believing that the coal dealt in by him was coal which had been inspected and graded by the complainants, and would thus operate to defraud the complainant, and constituted undue and unlawful competition in trade.

Affidavits and exhibits were filed with the bill in support of a motion for an injunction. A demurrer to the bill having been overruled, the defendant filed an answer, accompanied by affidavits and exhibits in opposition to the motion for an injunction. Several affidavits in rebuttal were thereupon filed on behalf of the complainants. Upon the record thus made the motion for

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an injunction was heard, and, after consideration by the court, it was decreed as follows:

"That the defendant in his own name, and in the name of the Pocahontas Coke and Coal Company, and in the name of the W. H. Coffman Coke Company, and his servants, attorneys, associates, confederates, agents and workmen, and each and every of them, be and the same are restrained and inhibited from using the name 'Pocahontas' or 'Pocahontas Flat Top' in connection with his business, the court being of the opinion that the complainants have a right to use the said word 'Pocahontas' for the purpose of indicating that the coal was from the Pocahontas field, and that the complainants have the sole right to use said word as indicating the character of coal they sell. But this injunction is not to restrain or inhibit the defendant or his agents from advertising, offering for sale or selling coal from what is known in Virginia, or West Virginia, as the Pocahontas coal field, or advertising the coal as so mined and produced from that field, and this injunction shall not apply to transactions of the defendant already concluded by actual shipments of coal."

The defendant appealed to the Circuit Court of Appeals for the Fourth Circuit. Among the assignments of error filed was the following:

"II. The court erred in rendering any decree at all until the merits of the said cause, as put in issue by the pleadings, were fully developed by proofs adduced in the proper order of chancery proceeding and practice."

The Circuit Court of Appeals reversed the decree of the Circuit Court and remanded the cause, with directions to dismiss the bill. It was held that the complainants had no trademark in the word Pocahontas; that they were not entitled to the exclusive use of that word to designate the coal sold by them, or its character or quality, but, on the contrary, that the word Pocahontas indicated coal mined in the Pocahontas coal field, and that all the producers of that region had the right to use it in common with the complainants. The court held that the proof did not show that the defendant had practiced any deception on the public or that he had perpetrated any fraud upon the ap-

pellees. Before the mandate issued, however, a rehearing was applied for, and the reviewing court was asked to provide in the mandate, after reversing the order granting a preliminary injunction, that the parties should "proceed to take their proofs in order that the cause may thereafter be heard upon pleadings and proofs, to the end that a final decree may be entered." This petition for a rehearing was denied, the court stating:

"We are clearly of the opinion, not only that complainants below are not entitled to an injunction, but also that there is no equity in their bill, and that, therefore, it will be a useless expenditure of time and money, and cause fruitless delay, to take the evidence mentioned in the petition for a rehearing."

The cause was then brought to this court by writ of certiorari.

Mr. Arthur von Briesen and *Mr. Frederick P. Fish* for Castner. *Mr. Henry E. Everding* was on their brief.

Mr. E. B. Stocking for Coffman.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The complainants in their bill predicate their asserted right to the sole and exclusive use of the name Pocahontas, as applying to coal, upon two grounds: First, the ownership of the alleged trademark, which it is averred the complainants acquired from the Southwest Virginia Improvement Company in April, 1895; and, second, upon a use by the complainants and their predecessors in right of the word Pocahontas as a trademark or name to designate the character and the quality of the coal dealt in by them. In other words, the complainants contend that for many years prior to the period when they assert they were vested by the Southwest Virginia Improvement Company with the ownership of the alleged trademark they, as licensees of said company, used the word Pocahontas to designate the coal sold by them, to such an extent that that word, as applied to coal, came to represent in the public mind the coal of the complainants; that this continued up to the time the trademark was acquired, and from that time down to the filing of the bill.

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Whilst the propositions above stated portray the rights asserted by the complainants in their bill, in their proof and in the argument at bar, a wider contention is advanced—that is, that the complainants have a right to the name Pocahontas, not only because they acquired it whilst acting under a license from the Southwest Virginia Improvement Company and as the assignees of a trademark owned by that company, but that they have a right to the name Pocahontas independently of the existence of any such right in the Southwest Virginia Improvement Company, or of the ownership by that company of a trademark embracing that name. Without stopping to consider the conflict which is engendered by this latter view, we shall at once proceed to an analysis of the evidence in the record, for the purpose of ascertaining whether the complainants have the exclusive right claimed by them, derived either as licensees or assignees of the Southwest Virginia Improvement Company, or in any other way.

The coal which was the subject of the dealings had by the complainants as averred in their bill, was the product of what is known as the Great Flat Top coal region of Virginia and West Virginia. It is referred to in the bill of complaint as "a tract or field of smokeless bituminous or semibituminous coal." The initial operations in the development of the region were begun in 1881 by a Virginia corporation styled the Southwest Virginia Improvement Company. Some surface work was done in the fall of that year. In March, 1882, the first blast was put in what was termed the east mine; a contract was closed to run that mine one mile; also the air course and the No. 1 west mine. These mines were situated respectively east and west of a stream called Coal Branch. As early as March, 1882, a contract was made to supply coal from these mines to the Norfolk and Western Railway Company. The branch of that road to the mines, however, was not completed until March, 1883, and the first shipment of coal was made in that month. As a result of the operations referred to a mining town was located near to the mines, and was called Pocahontas. It was made a post office in 1882. It had a population in January, 1883, of one thousand souls, and was incorporated by the legis-

lature of Virginia in 1884 under the name of Pocahontas. The Improvement Company also named its mines the Pocahontas mines, and from the beginning appears to have sold the product of its mines as Pocahontas coal.

Without minutely tracing the development of the coal field in question, it may suffice to say that either by acquiring coal lands from the Southwest Virginia Improvement Company, or from other sources, a land company, known as the Flat Top Association, became interested in lands within the coal field in question, and by 1885 several mines additional to those owned by the Southwest Virginia Improvement Company were being worked by other operators. The connection of the complainants or their predecessors with the mines or coal field in question arose as follows:

While it is alleged in the bill that "some time prior to January, 1884," Castner & Company, Limited, a corporation, "dealt in, inspected and sold coal from such region or field aforesaid," there is no proof in the record even tending to show that Castner & Company had any connection with Pocahontas coal prior to January 1, 1885. Indeed, as it will hereafter develop, the fact that they did not represent that article is clearly inferable from a statement made by them in an application for the registry of an alleged trademark.

It is established that in July, 1883, one William Lamb was the agent of the Southwest Virginia Improvement Company, at Norfolk, Virginia, and that the general sales agent of the company was one Edward S. Hutchinson, who was located in Philadelphia, at which place the general offices of the company were established. Castner & Company, Limited, became the general tidewater coal agent on January 1, 1885, for the product of all the mines then in operation in the Great Flat Top coal region, including the product of the original Pocahontas mines. This appointment was the outgrowth of an agreement entered into between the Norfolk and Western Railroad, the Southwest Virginia Improvement Company, the Flat Top Coal Company and three lessees of the latter company operating coal mines in the region referred to. This agreement was made on the 29th of December, 1884. It provided for the handling of the entire

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coal output of all the then producers, and of any subsequent operators in said region, by a general coal agent, to be appointed by the railroad company. The contract, moreover, provided for the appointment by the railroad company of another person, to be known as the general tidewater coal agent, and who was to be subject to the general direction and management of the general coal agent. It was also stipulated in the contract that the general coal agent should perform outstanding contracts of the Southwest Virginia Improvement Company for the delivery of coal. Castner & Company, Limited, were appointed the general tidewater coal agent under the agreement.

In passing, it is proper to notice the fact that the coal mined in the various collieries in operation at the date of this agreement, as is the case with the mines now being operated, was from the same seam as that mined at the original Pocahontas mines, which seam was then known as the "Nelson or Pocahontas bed, No. 3." It clearly appears from the record that prior to the date of the contract above mentioned, at a time when the predecessors of the complainants appear to have had nothing to do with the product at the Pocahontas mines, the coal mined from the Pocahontas vein had become well and favorably known as a coal of high grade. Thus, in a letter from sales agent Hutchinson, dated July 5, 1883, he states: "We are all especially pleased with the testimonial from Mr. McCarrick, and it confirms the view we have all along entertained, that the Pocahontas coal is the best steam coal in the market." So, also, in the eighth article of the contract between Castner & Company, Limited, and the railroad company, by which the former was appointed the general tidewater coal agent, it was recited that, "The coal from the Great Flat Top coal region has proved to be of superior quality, and suitable for steam purposes, and especially for the use of ocean steamships, as well as for sale in the West Indian and South American markets." That the coal supplied by the producers might, however, in some instances, be of inferior quality was recognized in a stipulation contained in the coal producers' contract, providing for an allowance to be made to purchasers of coal because of inferiority of quality, such allowance to be deducted from any amount found due or that might become due to the producer.

While the contract between the coal producers and the agreement appointing the general tidewater coal agent are contained in the record, the agreement appointing the general coal agent was not put in evidence. One of the complainants, in an affidavit dated March 18, 1897, attached as an exhibit a monthly statement rendered by the coal agent, which is headed "Office of the General Coal Agent, Roanoke, Virginia, February 15, 1885." Nowhere in the statement however, is there an intimation as to who was such coal agent. It is plainly inferable, however, from the excerpt which we now make, who was the appointee to that responsible position. The extract we make is from the issue of October, 1891, of a publication styled, "The Iron Belt." It reads as follows:

"POCAHONTAS COMPANY.

"The Pocahontas Coal Company, organized January 1, 1895 (1885?). Officers: William C. Bullitt, president; D. H. Matson, secretary and treasurer; H. N. Claxton, general agent; John Twohy, superintendent piers, Norfolk; general office, Roanoke, Va.; branch office, Norfolk, Va.; shipping office, Bluefield, W. Va. This company, who makes all sales for the entire output of the region, assuming all liabilities, shipped during the year 1890, 1,807,716 tons, and has shipped during the present year to date (October 10th), 1,628,927 tons. 'From present indications,' says Mr. Matson, secretary of the company, 'we estimate that for the year 1891 we will ship 2,300,000 tons.'

"The Pocahontas Coal Company makes a uniform price for all coal mined, furnishes inspectors for each tipple where the coal is loaded, thus guaranteeing to purchasers coal free from bone, slate and other impurities. This company pays the operators by check the fifteenth day of each month, thus securing them against losses by reason of bad debts, storage and freight rates. The company employs twenty-six sub-inspectors, who are under the supervision of Mr. W. D. Milne, chief inspector. Mr. Milne's headquarters are at Bramwell, and he makes a tour of inspection of each tipple at least once a week."

So, also, there is contained in the record a letter, headed with the names of the then officers of what is termed "Pocahontas

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Coal Company, shippers of celebrated Pocahontas coal." On this letter head was a vignette, presumably the figure of Pocahontas. This letter was addressed to the proprietors of the Indian Ridge Colliery, and referred to the handling by the Pocahontas Coal Company of the product of that colliery. The Indian Ridge Colliery, referred to in this letter, is one of the mines represented by the defendant in this cause. The operation of this mine was commenced about the date of the letter, and its product, in accordance with the general agreement already stated, was shipped through the general coal agent, the Pocahontas Coal Company.

In the article in The Iron Belt, above referred to, there is also a statement of the production from 1883 to 1891 of the various mines controlled in October, 1891, by the Pocahontas Company, as the general coal agent of all the mine owners or operators. This statement showed that from one colliery operating in 1883 the number of collieries had increased to nineteen in October, 1891.

Under the coal producers' agreement, as we have seen, the entire product of the mines in the Great Flat Top coal region, intended for rail transportation other than that used for coke, was to be consigned to the general coal agent, and only a portion of such product was to be handled by the general tidewater coal agent, whose operations were to be "subject to the exclusive control, supervision and direction of the general coal agent."

We have already referred to the fact that when the combination referred to was formed the coal mined from the Pocahontas, or No. 3 bed, had, under that name, an established reputation. Further confirmatory evidence of this fact will now be referred to. Andrew S. McCreath, chemist to the state geological survey, of Pennsylvania, embodied the results of much research and personal investigation during part of 1882, and the fall of 1883, and the spring of 1884, in a work entitled "Mineral Wealth of Virginia," extracts from which are contained in the record. At page 110 he mentions the existence of numerous openings on the "Nelson or Pocahontas coal bed (No. 3 of the section,)" and also of some few openings

on the upper beds, No. 5 and No. 6. He further says (p. 110):

"On Coal Branch, the Pocahontas bed (No. 3) has been extensively mined at the Pocahontas mines of the Southwest Virginia Improvement Company."

At page 150 he says:

"The section at Pocahontas shows the presence of at least three workable beds above water level, although almost the entire output of the region at present comes from the No. 3 Nelson or Pocahontas bed.

"This handsome coal bed is everywhere present, so far as explored, with a workable thickness, being 11′ 3″ in the vicinity of Pocahontas, and holding its workable dimensions through the field for five miles eastward to the waters of Flipping Creek, where it becomes split into two beds, about 4½ and 5½ feet thick.

"To the west of Pocahontas, along Laurel Creek, for a distance of eight miles, the bed carries its full thickness fairly well, and shows nearly the same section for a long distance north of the dividing ridge on the waters of the Elkhorn and the Tug Fork of Sandy.

* * * * * * * *

"The good quality of this coal has been well established by numerous tests, both in the laboratory and in actual practice."

The Pocahontas Coal Company appears to have continued to act as general coal agent of the producers' combination until the spring of 1895, about the time of the appointment of a receiver for the Norfolk and Western Railroad, which company, as will be remembered, was a party to the original agreement of the combination. By this time the development of the coal field in question had largely progressed, and a number of additional mines were being operated. A new company, called the Pocahontas Company, was chartered on March 12, 1895, and in 1896 this company was handling the coal produced from numerous mines in the Pocahontas field. Agreements were made, however, by the complainants in March, 1895, directly with some of the mine owners formerly represented by the Pocahontas Coal Company, (among them the Southwest Virginia Improvement Company,) by which agreements complain-

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ants were constituted the general factors and selling agents for the product of the mines of such owners.

The product of the Indian Ridge mine, now represented, as we have said, by the defendant, and which was opened in the spring of 1894, when it ceased to be shipped through the Pocahontas Coal Company, as general agent, was marketed through the agency of the complainants until January 1, 1896. From this last mentioned date until November 1, 1896, the product of the mine was shipped through the Pocahontas Company, the complainants having become the sole agents of the latter company for tidewater and line trade.

It is plainly inferable from the averments of the bill, as it is unquestionably established by the evidence in the record, that from January 1, 1885, the date of the coal producers' combination referred to, the product of the various collieries controlled by the combination was uniformly termed Pocahontas coal, and the evidence shows that this appellation was made use of as well upon bill heads and advertising matter of the general coal agent, and of some, at least, of the producers, as upon the stationery and advertising matter of Castner & Company, Limited, the general tidewater coal agent.

It is by the light of the facts just stated that we come to consider the claim made in the bill that the complainants are the exclusive owners of the trademark or the trade name Pocahontas, as applied to all coal coming from the Pocahontas coal field, because prior to April 1, 1895, they had used the same by the license and permission of the Southwest Virginia Improvement Company, and subsequent to that date had used it as owner under an assignment of said trademark or trade name to them from the Improvement Company. There is no evidence whatever in the record tending to show any express license to complainants or their predecessors from the Southwest Virginia Improvement Company, authorizing them to use the name Pocahontas as an exclusive trade name or trademark for coal; and the facts which we have above stated render it absolutely impossible that there should have been any such valid license. It is patent that the word Pocahontas, prior to the formation of the coal producers' combination on January 1, 1885, indicated

all the coal coming from a particular seam of coal known as the Pocahontas vein. When the combination was entered into, creating a general coal agent to dispose of all the coal to be marketed from all the collieries which were then being worked or might thereafter be worked in the Pocahontas region, it is undoubted that the name Pocahontas was applied by everybody concerned, including the Southwest Virginia Company, as indicating coal coming from the region, without reference to the particular mine from which it was taken, for all the coal was advertised by the owners and general coal agent under the name of Pocahontas coal, and was contracted for and shipped under the same name. Indeed, during the existence of the original combination the complainants, or their predecessors, who now assert that they have an exclusive right to the name Pocahontas as designating the coal sold by them, were acting as tidewater agents under the supervision and control of the general coal agent, for all the mine owners, and were themselves selling the coal under the name referred to as agents of the owners, and dealing in such coal, on behalf of the owners of all the mines, as Pocahontas coal. When the Pocahontas Coal Company ceased to act as the general coal agent, on the appointment of a receiver of the Norfolk and Western Railroad, the complainants, who now assert the exclusive right in themselves to the name Pocahontas, became the principal agent for the sale of the coal from some of the mines, among the number one of the mines controlled by the defendant, putting the product of that mine upon the market, as agent of the owner, as Pocahontas coal.

Destructive as is this state of the proof of the assertion that there was a license to the complainants prior to 1895 by the Southwest Virginia Improvement Company, the existence of such a license is further rebutted by the fact that there is no evidence of any want of knowledge by the Southwest Virginia Improvement Company of the use by the Pocahontas Coal Company or by the producers generally of the designation Pocahontas as the name of the coal mined in any and all of the collieries in operation in the region. Indeed, the exaggerated character of the assertion of the complainants, that prior to 1895 they

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use the trademark as the licensees of the Improvement Company, is shown by the record. In August, 1885, Castner & Company, Limited, was under the contract the general tidewater coal agent, that is, such agent for all the mine owners in the Pocahontas region. Although thus representing the owners, this corporation, on the 25th of August, 1885, filed an application for the registry of a trademark, in which it was recited that Castner & Company, Limited, had adopted for its use as a trademark for coal the word "Pocahontas," and that the same had been continuously used by said corporation "since about January 1, 1885." This date, it will be remembered, was when the corporation referred to became the general tidewater coal agent for the producers of Pocahontas coal. In an affidavit deposing to the truth of the statements contained in the application, it was stated:

"That said corporation (Castner & Co., Limited,) has a right to the use of the trademark therein described; that no other person, firm or corporation, has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive."

The conflict between the claim of license made in the bill and these sworn assertions in the application to register a trademark requires no comment. The record, however, shows a further contradiction. Turning to Exhibit B, attached to the bill, which is the alleged assignment of trademark made in 1895 by the Southwest Virginia Improvement Company to Castner & Company, Limited, and under which complainants claim to be the owners of the trademark Pocahontas, as applied to all coal, we find it recites that Castner & Company, Limited, had been appointed on March 26, 1895, the agents to sell all the output of coal of the mines of the Improvement Company, which coal "has become known under the trade name, or mark, 'Pocahontas,' by adoption and continuous use thereof by the said corporation, the Southwest Virginia Improvement Company." Besides this, the document states that the assignor, the Southwest Virginia Improvement Company, "did adopt, on or about the first day of July, 1882, as a trade name, or mark, the word 'Pocahontas' for coal mined in a region of

field opened up and operated in Tazewell County, Virginia, in the year 1882, by the said corporation, the Southwest Virginia Improvement Company, and which trade name, or mark, it continued to use thereafter in its coal mining operations in said region, or field, from the date aforesaid, as the trade name, or mark, for all coal mined and sold by it up to the present time."

Thus we have Castner & Company, Limited, becoming by contract an agent of the mine owners to sell their coal, putting it upon the market as Pocahontas coal, and dealing with it as such, yet filing a claim for a trademark by which it was sought to deprive the owners of the designation which appropriately belonged to their product. We find the bill verified by both complainants, one of whom made oath to the application for a trademark. In such bill it is asserted that at the time the trademark was applied for Castner & Company, Limited, were not the owners of the trademark, but were mere licensees of the Southwest Virginia Improvement Company.

And also it appears that, when in 1895 the complainants became the principal agents of certain of the mine owners, a monopoly of the name of Pocahontas as against all the mine owners was again sought to be obtained by taking a transfer of an alleged trademark or name from the Southwest Virginia Improvement Company, the statements in the paper reciting such transfer being in irreconcilable conflict with the affidavit to the application for a trademark.

But putting out of mind these contradictions, it is manifest that, long prior to the purported assignment by the Southwest Virginia Improvement Company of the alleged trademark or trade name, by the acts of all the parties concerned in the production and marketing of the coal, (including the Southwest Virginia Improvement Company, Castner & Company, Limited, and the complainants,) the name Pocahontas indicated the region from which the coal in question came and the natural quality thereof, and applied indiscriminately to the product of all the mines in that region, producing that character of coal.

Although the facts which we have referred to make inevitable the foregoing deductions, nevertheless we state a few additional facts which make the situation if possible yet clearer.

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In the issue of October, 1891, of The Iron Belt, already referred to, the region in question was termed the Pocahontas Flat Top coal region, and the product thereof was frequently referred to as Pocahontas coal or Pocahontas Flat Top coal. So, also, in the agreements made by complainants in March, 1895, (after the producers' combination had ceased to be operative,) to act as sales agent for the product of certain of the mines, there is contained express recognition of the fact that the products of all the mines in that region, whether those products were inspected and controlled by the complainants or not, were usually designated and generally known as Pocahontas coal. Thus, in a stipulation numbered 3 in an agreement made by complainants with the Pulaski Iron Company on March 26, 1895, it is recited:

"It is agreed by the parties hereto that the parties of the second part may act as selling agents for other producers of Pocahontas coal, provided they shall become and continue to be the exclusive agents of such producers, and provided further that the aggregate amount of coal sold during any year for the party of the first part shall be less than 2.615 per cent of the total amount of Pocahontas coal sold by the parties of the second part during that year."

And in a supplementary agreement with the same company, dated December 28, 1895, it is said:

"That, until the expiration of the said contract of 26th March, 1895, according to the terms thereof, the party of the first part will sell or dispose of no Pocahontas coal whatever save through the agency of the parties of the second part.

* * * * * * * *

"The parties of the second part hereby promise and agree that in the event of the sale or disposition of any Pocahontas coal by any producer for whom they may at any time be acting as sales agent, except through the agency of the said parties of the second part, that they will at once, on receipt of written notice of the particulars of such sale or disposition from the party of the first part, and upon its written request, forthwith terminate its agency for such producer," etc.

Again, in a supplement to The Daily Telegraph, a publication

at Bluefield, West Virginia, such supplement being entitled "Pocahontas Flat Top Coal Field Industrial Edition," the product of the region referred to is frequently spoken of as Pocahontas coal or Pocahontas coke, etc. And, as bearing upon the claim made in the bill, that the coal from this field had acquired a great reputation in the markets of the world by reason of the expenditures of time and money made by complainants "in inspecting, selecting, grading and otherwise maintaining the superior quality and purity of the said coal," we call attention to a lengthy advertisement of the complainants contained in the publication just referred to, in which appeared no allusion to an inspection of the product, but wherein it was clearly recognized that the wide reputation of Pocahontas coal was the result of making known the inherent excellent quality of the article itself. The product of the mines represented by the complainants, among which mines was the Indian Ridge mine, now represented by the defendant, is frequently referred to in the card as Pocahontas coal. We excerpt portions of the card in the margin.[1]

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[1] "CASTNER & CURRAN

Are the General Agents for the sale of

Pocahontas Flat Top Smokeless Semi-Bituminous Coal.

"Having satisfied themselves by exhaustive analyses and tests that POCAHONTAS COAL was unequaled as a Steam Fuel, they determined to leave nothing undone to demonstrate this fact and establish its reputation as second to no other coal, and owing to their energetic efforts and judicious advertising, POCAHONTAS COAL to-day enjoys the unique distinction of being the only coal in the world that has been officially indorsed by the Governments of Great Britain and the United States. It is always used in testing the speed of Government cruisers built on the Atlantic seaboard, the Secretary of the Navy having issued an order to this effect several years ago. The Cunard and White Star Steamship Companies use it exclusively on their Eastern voyages, and with it have made all their great speed records of recent years. It is conceded to be the Best Fuel for Locomotives and Stationary Engines, and its supremacy as a Steam Fuel is now established beyond dispute.

"THE RECORD OF POCAHONTAS COAL IS THE MOST REMARKABLE IN THE HISTORY OF THE TRADE.

"The first mine was opened in 1883, the shipments for that year amounting to only 75,000 tons.

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Now, this advertisement of the complainants makes it clear that they were offering for sale, not the particular product of any one mine, but that the Pocahontas coal which they advertised was derived from numerous collieries within the Pocahontas region. Indeed, when it is considered that coal from the Indian Ridge mine, which the defendant now represents, was for a time represented by the complainants, and the coal therefrom sold by them as Pocahontas coal, the contention now advanced amounts but to this, that an agent can deprive the principal of his property by appropriating it to himself, and that complainants, because they were entrusted, first, in a subordinate capacity as tidewater agents by many of the mine owners and then in a more enlarged capacity as general agent, with power to represent and act for the producers, have come into the position where they can virtually exercise a monopoly of sale as to the product of all the mines in the Pocahontas region by compelling every mine owner in the Pocahontas field to offer no coal on the market unless the description be qualified or unless the coal be confided for sale to the complainants.

It is insisted, however, that the appellate court should have complied with the request contained in the petition for a rehearing, and remanded the cause to permit further proofs in support of the material allegations of the bill. In *Mast, Foos & Co.* v. *Stover Manufacturing Co.*, 177 U. S. 495, we considered the question as to the power of a Circuit Court of Appeals, in reviewing the action of a Circuit Court in allowing a temporary injunction *pendente lite*, upon affidavits, to consider the case upon the merits and direct a final decree dismissing the bill. It was held that the propriety of the exercise of such a power must be determined from the circumstances of the particular case. And it was added:

"In 1895 there were thirty-eight collieries in operation, whose output (including tonnage converted into coke) aggregated 3,500,000 tons.

"Not only is this coal famous for the immense growth of its tonnage, but its reputation has also increased, until to-day it enjoys the distinction of having been officially indorsed as the *best American steam coal by the United States Navy Department, the United States War Department, the British Minister at Washington, all the leading steamship, railroad and manufacturing companies*," etc.

"If the showing made by the plaintiff be incomplete; if the order for the injunction be reversed, because injunction was not the proper remedy, or because under the particular circumstances of the case it should not have been granted; or if other relief be possible, notwithstanding the injunction be refused, then, clearly, the case should be remanded for a full hearing upon pleadings and proofs. *But if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment;* or if the patent manifestly fail to disclose a patentable novelty in the invention, we know of no reason why, to save a protracted litigation, the court may not order the bill to be dismissed."

As respects the case at bar, we are satisfied from the averments of the bill and the proof that no supplementary evidence could be offered which would alter the indubitable conclusion that no exclusive right to the trademark or trade name Pocahontas exists in the complainants. Further, we concur in the conclusion of the Circuit Court of Appeals, that the bill, upon its face, is devoid of equity. It is fairly to be inferred from the averments of the bill that it charges that while acting as agents of the owner of one of the mines represented by the defendant, and of the owners of many other mines in the same region or field, there was applied by the complainants to the product of all the mines the appropriate designation Pocahontas coal, a description which applied to all the coal produced by the operators in that region, and which was correctly descriptive of such product. Whether, as claimed, the reputation of the coal was enhanced by careful inspection and grading by the complainants or their predecessors, is left conjectural by the record. But if it be conceded that the proof on this branch of the case was certain, it could operate no change of result. In inspecting and grading the coal, complainants and their predecessors were but agents of the mine owners. Certainly, the agent cannot be heard to say that he may appropriate to himself the name belonging to the product of his principal, or that he may affix the name to coal for his own purposes, and not for the benefit and advantage of his principal.

Keeping in mind the circumstances under which the com-

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plainants made whatever use they did make of the appellation "Pocahontas," as applied to coal produced from the Pocahontas coal region, we can perceive no just ground for the claim that there was unfair competition in trade, by reason of the acts averred to have been committed by the defendant. In substance, the alleged wrongful acts were averred to consist in the advertising in various forms by the defendant of the coal handled by him, as "Pocahontas" coal, when in fact such coal is a "very inferior and very impure coal." It was also averred, *in the alternative*, that such acts were done with the intent to cause the purchasers of said coal to believe "that the same was sold by your orators, or is *of the quality* of that sold by your orators." The effect of the advertising of the coal handled by the defendant, as "Pocahontas" coal, it is also asserted, is that purchasers of the coal dealt in by the defendant are liable to and will be deceived by such representations into purchasing such coal "as your orators' superior and specially selected coal." It is further averred that purchasers have in fact been so deceived, and that the "reputation of your orators' 'Pocahontas' coal has thereby been tainted." Leaving out of view the emphatic denial of the defendant, that the coal handled by him is in anywise inferior to that handled by the defendant, it is plain from the averments in the bill that the alleged inferiority in the coal is grounded upon the supposition of a want of careful inspection and grading. We do not think, however, that if it were a fact that it had become generally known and recognized by the public that the complainants, while in the employ of the coal producers of the Pocahontas coal field, inspected and graded the product of the mines in such manner as that thereby the reputation of the coal was enhanced, that the owners of mines producing Pocahontas coal thereby lost their right to designate their coal by its appropriate name, because of the possibility that some person, by reason of the coal being termed what it really was, might be induced to believe that it was still inspected by complainants.

As we have already said, in its final analysis, the right which the complainants assert amounts but to the contention that because at one time they were the agents of the owners of coal

mined from the Pocahontas field, and had sold the same as agents for the owners under its correct name, they thereby divested the owners of their property, and have acquired a monopoly of selling all the coal from the Pocahontas field under its appropriate name. We think there was no error in the decree of the Circuit Court of Appeals, and it is therefore

Affirmed.

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